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VERSIONS: Full volume

Wisconsin Criminal Defense Manual
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Wisconsin Criminal Defense Manual

Seventh Edition

*Includes 2024–25 Integrated Supplement

Kathleen Pakes

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A Cautionary Note
This book is presented with the understanding that the publisher does not render any legal, accounting, or other professional service. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, anyone using this material must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client’s legal matters. In no event will the authors, the reviewers, or the State Bar of Wisconsin be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Summary of Developments

New Developments Reported in the 2024–25 Supplement

The 2024–25 supplement to the *Wisconsin Criminal Defense Manual* reflects legal developments since publication of the 2022–23 supplement, including the following:

Forms, checklists, hyperlinks, and appendices have been updated as needed.

In 2024, the Wisconsin Supreme Court issued a decision about the timing of substitution requests. *See* § 1.9.

The law regarding defendants’ access to confidential and privileged records of victims and complainants continued to evolve. *See* §§ 1.42, 5.37.

In a 2023 opinion, the Wisconsin Supreme Court discussed cures for material and substantial breaches of plea agreements. *See* §§ 1.52, 6.7.

For certain crimes, there is now the possibility of an enhanced sentence when the victim is an “elder” person (60 years old or older). *See* § 1.64.

Chapter 2 contains a brief discussion of the importance of avoiding overwork. *See* § 2.1.

There is a new statutory procedure, created by a Supreme Court Order in 2024, for appealing orders under Wis. Stat. § 971.14 (competency determinations and involuntary medication orders). *See* Form 2.4A, § 9.21.

In a 2023 opinion, the U.S. Court of Appeals for the Seventh Circuit considered the constitutionality of hidden physical restraints (e.g., shackles) on defendants in courtrooms. *See* § 5.16.

The form motion for psychological examination of complaining witness has been removed from chapter 5.

In a 2023 unpublished opinion, the Wisconsin Court of Appeals considered appropriate remedies for the prosecution’s destruction of evidence. *See* § 5.48.

An expanded discussion of hearsay-type Confrontation Clause challenges involving laboratory analysts appears in section 5.55.

In a 2023 opinion, the Wisconsin Supreme Court discussed the appropriateness of a prosecutor's comment about a victim's testimony. *See* § 5.55.

In a 2023 opinion, the Wisconsin Supreme Court considered whether a defendant can earn sentence credit for read-in crimes if the crimes originated in different counties. *See* § 6.18.

Some web pages and online resources of the Office of the Wisconsin State Public Defender (SPD) have been updated or moved. The most up-to-date URLs and versions of forms appear in chapter 10.

The statutory compensation rate for private attorneys on cases assigned by rotation has increased to $100 per hour for time spent in court and out of court (excluding travel) and $50 per hour for time spent in travel outside the county in which the attorney's principal office is located. *See* § 10.22.

The SPD amended the list of factors it might consider when auditing attorneys' bills for "reasonableness." *See* § 10.24.

New Developments Reported in the 2022–23 Supplement

The 2022–23 supplement to the *Wisconsin Criminal Defense Manual* reflects legal developments since publication of the 2020–21 revision, including the following:

Forms, checklists, hyperlinks, and appendices have been updated as needed.

The Wisconsin Jury Instructions are available online for free, at the website of the Wisconsin State Law Library. *See* §§ 1.4, 4.3.

In 2021, the Wisconsin Court of Appeals issued an opinion in a case in which the timing of a defendant's preliminary examination was the key factor. *See* § 1.7.

The U.S. Court of Appeals for the Seventh Circuit decided a case in 2022 in which the timing of a bail hearing was at issue. *See* §§ 1.61 (Checklist of Time Limitations), 2.4A (same).

The discussion in chapter 2 about organizing information and managing files has been expanded.

A sample spreadsheet, for use as a case log, appears in chapter 2.

The discussion of the exclusion or suppression of evidence has been expanded. *See* § 4.7 (Checklist of Possible Defenses).

A discussion of defenses for victims of human trafficking appears in chapter 4. *See* § 4.7 (Checklist of Possible Defenses).

In 2020, the Wisconsin Court of Appeals issued an opinion in which it discussed potential in camera inspection of witnesses' records. The Wisconsin Supreme Court has granted review. *See* § 5.37.

In a 2022 opinion, the Seventh Circuit considered whether a dog sniff outside a defendant's hotel room door was a search. *See* § 5.45.

Several items have been added to the list of possible consequences of conviction in section 6.35 (Checklist for Advising the Client on the Plea Decision): transfer to an out-of-state prison facility, revocation of probation for refusing to complete probationary sex-offender treatment, termination of parental rights, restrictions on possession of various types of weapons, restrictions on receipt of public benefits, employment discrimination, and housing discrimination.

Chapter 7 contains a Practice Tip regarding the use of witnesses at trial, in the wake of voters' approval in 2020 of the Marsy's Law crime victims' rights amendment to the Wisconsin Constitution. *See* § 7.8.

The discussion of rebuttal witnesses has been expanded. *See* § 7.12.

In a 2022 opinion, the Wisconsin Supreme Court compared commitment periods to traditional criminal sentences. *See* § 8.9.

The Wisconsin Supreme Court, in a 2022 opinion, considered the constitutionality of counting a prior refusal toward the graduated penalty in the operating-while-intoxicated guidelines. *See* § 8.24.

In an unpublished 2021 opinion, the Wisconsin Court of Appeals discussed the validity of a circuit court's restitution order. *See* § 8.49.

In a published 2022 opinion, the Wisconsin Court of Appeals considered whether a defendant's constitutional right to be present at sentencing was violated. *See* § 8.64.

Developments Reported in the 2020–21 Revision

The 2020–21 revision of the *Wisconsin Criminal Defense Manual* reflects legal developments since publication of the 2018–19 supplement, including the following:

All forms, checklists, hyperlinks, and appendices have been updated as needed.

In 2020, voters approved an amendment to the Wisconsin Constitution that provides additional rights to crime victims. *See* §§ 1.17, 6.4, 7.8.

In 2019, the Wisconsin Supreme Court discussed whether the state has a duty to disclose evidence that is not within its exclusive possession and control. *See* §§ 1.42, 1.66, 5.36A.

In 2019, the Wisconsin Supreme Court addressed the standard for admissibility of identification evidence. *See* §§ 1.43, 5.16, 5.46.

Section 2.1 refers to an ethics opinion regarding a client's demand for electronically stored documents.

Some topics have been added for the client interview, including whether police body cameras were used, whether the client signed waiver-of-rights forms, and whether social media might provide evidence. *See* §§ 3.59, 3.60, 3.65, 3.78.

An attorney has an ethical duty to raise competency as a narrow exception to the attorney-client privilege. *See* § 4.7.

Section 4.7 addresses whether voluntary intoxication can still be raised as a defense.

Defendants have no right to an argument or a jury instruction for jury nullification. *See* § 4.7.

Defense counsel is advised how to deal with lesser-included offenses. *See* § 4.7.

Chapter 5 discusses electronic filing requirements and new filing requirements per 2019 Wis. Act 30.

A 2020 Wisconsin Supreme Court case involved a vehicle search incident to arrest. *See* § 5.45.

Two recent U.S. Supreme Court opinions discuss how suppression can be based on a physical intrusion onto constitutionally protected effects or real property. *See* § 5.45.

A 2018 U.S. Supreme Court decision addressed whether double jeopardy's issue preclusion applies when the defendant has stipulated to severance of charges and multiple trials. *See* § 5.25.

Section 6.11 includes expanded discussion of ethical questions created in some plea negotiations and the answers to such questions.

Section 8.14 discusses when a person with an extraordinary health condition can be considered for early release from prison.

The Wisconsin Supreme Court issued a decision in 2019 examining when a defendant is subject to an escape charge with reference to the escape statute or other governing statutes. *See* § 8.27.

In 2019, the Wisconsin Court System issued a revised Prisoner's Petition for Waiver of Prepayment of Fees and Costs/Affidavit of Indigency and the accompanying Order. *See* § 9.44.

The Wisconsin Supreme Court increased the rate of compensation in 2019 for private attorneys on cases assigned by rotation for time spent in court. *See* §§ 10.22, 10.27.

The Petition for Appointment of an Attorney form and accompanying Order were updated in 2019. *See* § 10.25.

The SPD issued a new form governing Trial—Litigation Experience and Training Requirements in 2019. *See* § 10.26.

Foreword

Since the publication of its first edition more than 30 years ago, the *Wisconsin Criminal Defense Manual* has provided lawyers with sound practical guidance regarding the criminal defense process. The book was first published in 1981, revised in 1992 as a joint project of the State Bar of Wisconsin and the Office of the State Public Defender, and revised again in 1996, 2005, 2011, and 2015. The State Bar of Wisconsin is pleased to be publishing the seventh edition of this highly respected resource. On behalf of the State Bar and the many attorneys who rely on this important book, we express our gratitude to several individuals who made this publication possible.

First, we thank Pat Devitt, who wrote the original volume and revised it for the 1992 (second) edition. Mr. Devitt's blend of legal expertise and heartfelt commitment to the field of criminal defense formed the foundation for this most useful resource. L. Michael Tobin joined the project as coauthor with the 1996 (third) edition after having served on the Editorial Review Board for the earlier revision. While on the project, Mr. Tobin demonstrated his dedication to ensuring high standards in criminal defense practice through his invaluable contributions to this manual, giving generously of his time and expertise to painstakingly update and revise the *Wisconsin Criminal Defense Manual* through the fifth edition. After the fifth edition, Kathleen Pakes joined the project as coauthor, and she has served as author through the new seventh edition.

Thanks are due to the Editorial Review Board for the seventh edition: Sara Ward Cassady, Tim Drewa, Zachariah Fudge, Eric Heywood, Steve Hughes, Margaret Johnson, Ellen Krahn, Suzanne O'Neill, Jon Padgham, Adam Plotkin, Gina Pruski, Vince Rust, Nicholas Smith, and Ben Szilagyi.

Special thanks are also due to a number of individuals who were involved with the 1992 revision of the *Manual*. We acknowledge Nicholas L. Chiarkas and Eileen A. Hirsch of the Office of the State Public Defender for their commitment to the project and for their thoughtful feedback on the manuscript. We also thank Kenneth P. Casey and Frederick Miller, who reviewed the manuscript and provided guidance at several key points. Sixteen attorneys and judges served on the Editorial Review Board for the 1992 (second) edition, donating their time to read early drafts and offer astute comments that contributed greatly to the quality of the published volume. We extend special thanks to Stephen P. Hurley, who reviewed both the first edition and the 1992 revision and graciously answered the many questions we directed to him. Special thanks must also go to Editorial Board members Anne A. Devitt, Mark A. Frankel, William G. Retert, and David N. Zerwick for their generous contributions to the project.

Finally, I want to acknowledge the work of the State Bar of Wisconsin staff responsible for the development of this new edition. Many thanks go to attorney editors Rita Knauss and Peggy Crooks-Mishacoff, and production coordinator Jackie Johnson, for their work in ensuring a high-quality, valuable resource.

CAROL CHAPMAN, ESQ.
PUBLICATIONS MANAGER
STATE BAR OF WISCONSIN

Preface

The *Wisconsin Criminal Defense Manual* is a collection of ideas on the practice of criminal law in Wisconsin. The focus is on the defense of adult defendants in the state circuit courts. Most of the materials in this volume can, however, easily be adapted for juvenile delinquency matters.

The *Manual* is intended to be practical and useful. The emphasis is on the "how to" aspects of criminal defense work. The nuts and bolts of criminal work are best learned by doing, rather than by consulting scholarly treatises on criminal law or procedure. The ideas, methods, forms, and checklists in this volume represent what we have learned by doing or have borrowed from other successful criminal defense lawyers. I commend these ideas to you as suggestions or starting points. They are not written in stone. I hope you will change and add to the ideas presented here in ways that suit your own style and experience. The *Manual* is designed to make your criminal defense work more efficient, thereby giving you more time to be creative in the practice of criminal law and to develop your relationship with clients.

The *Wisconsin Criminal Defense Manual* will continue to be revised and updated periodically in light of future legislation and judicial actions. I encourage each reader to supplement the materials in this book with personal notes, forms, and checklists and to share these ideas with the State Bar of Wisconsin or with the authors. We welcome any additions, deletions, corrections, or supplemental forms. Please, let us hear from you.

—Kathleen Pakes
Assigned Counsel Division Director
Wisconsin State Public Defender

Acknowledgments (Seventh Edition)

The seventh edition of the *Wisconsin Criminal Defense Manual*, like the previous editions and updates, reflects the hard work and ideas of many people in the field of criminal defense. Patrick J. Devitt deserves particular credit for his authorship of the 1992 edition of the manual, the organization and content of which remain the core of the current edition. I also would like to thank L. Michael Tobin, who took over for Attorney Devitt. Thanks also to State Public Defender Kelli Thompson, former State Public Defender Nicholas Chiarkas, and the entire Agency Leadership Team of the State Public Defender (SPD) for encouraging and supporting our work on this project.

I also acknowledge and greatly appreciate the assistance of the editorial board for the seventh edition: Sara Ward Cassady, Tim Drewa, Zachariah Fudge, Eric Heywood, Steve Hughes, Margaret Johnson, Ellen Krahn, Suzanne O'Neill, Jon Padgham, Adam Plotkin, Gina Pruski, Vince Rust, Nicholas Smith, and Ben Szilagyi.

Finally, I am indebted to all Wisconsin attorneys who defend clients in criminal cases. Their unending passion, dedication, and creativity enhance the quality of the criminal justice system for everyone.

—Kathleen Pakes

About the Author

Kathleen (Kathy) Pakes is a 1995 graduate of the University of Louisville (Brandeis) School of Law and began her career as a public defender in Louisville, Kentucky. After a stint as a prosecutor in Ladysmith, Wisconsin, she returned to criminal defense and joined the Office of the Wisconsin State Public Defender as legal counsel. She currently serves as the Assigned Counsel Division Director and as a Forensic Practice Coordinator specializing in cases that involve child abuse and child death. Pakes is a member of the American Academy of Forensic Sciences and regularly presents on forensic topics. She serves on the Board of Administrative Oversight for the Office of Lawyer Regulation.

Very special thanks are extended to the following individuals for their work on the 2024-25 supplement to *Wisconsin Criminal Defense Manual*:

Timothy Drewa practices law as an Assistant State Public Defender in the Milwaukee appellate office. He possesses significant trial litigation experience from previous trial division service and private practice. Drewa has contributed to the legal community by training and mentoring attorneys and people who are not lawyers, co-founding and working in a specialized treatment court, and volunteering. He enjoys spending time with his family, coaching children, and reading.

Kate Drury is a proud public defender and zealous litigator. At the Office of the Wisconsin State Public Defender (SPD), Drury worked as a Regional Attorney Manager for five SPD offices covering 13 counties in central Wisconsin. She serves as a trial attorney in the Stevens Point SPD office, having left management to devote more time to direct client representation. Drury also serves as the SPD's Immigration Practice Group Coordinator, providing information to staff and private bar attorneys statewide about immigration consequences for criminal defendants, consulting on individual cases, and conducting training. When the COVID-19 pandemic struck, Drury participated in a statewide workgroup regarding future policies and procedures of videoconferencing. Drury is a graduate of the University of Wisconsin Law School and in her free time enjoys jogging, gardening, and baking sourdough bread.

Peter R. Heyne, Marquette 2010, cum laude, has been an Assistant State Public Defender in the Trial Division, Green Bay office, since 2015. Before joining the Office of the Wisconsin State Public Defender (SPD), he spent five years in private solo practice, with a focus on trial and appellate criminal cases, as well as juvenile and family law, and civil litigation. Heyne earned a master's degree in English and bachelor's degrees in classics (Greek and Latin) and drama from the University of Dallas. An accomplished writer, he contributed to the 2022 *Wisconsin Criminal Defense Manual* updates, the Brown County GAL handbook (e.g., on child abuse injunctions), and multiple publications through State Bar of Wisconsin platforms. He has presented at the annual SPD conference on a variety of topics, including domestic abuse, penalty enhancers, and knife laws.

Jennifer Kelley began her career litigating for waiver of the death penalty in capital criminal cases in Miami, Florida. In 2004, she graduated cum laude from St. Thomas University, Miami, Florida, where she served as an articles editor for the law review. She has been an Assistant State Public Defender in the Trial Division, Appleton office, since 2020. Before joining the Office of the Wisconsin State Public Defender, Kelley spent a decade working for various law firms in Miami, with a focus on trial and appellate criminal cases, as well as some civil litigation. Before law school, Kelley earned a degree in sociology from the University of San Francisco. She then studied in a Master of Social Work program in Miami, where she started working with the Miami-Dade Public Defender's Office as a forensic social worker. It was during this time that the spark was ignited for her passion for working with people with chronic and persistent mental illness in the criminal justice system. Kelley was part of the Miami-Dade County Mayor's Mental Health Task Force and a founding member of what is now the Eleventh Judicial Circuit Criminal Mental Health Project. She has been a part of the Outagamie County Mental Health Treatment Court since 2021 and has served on the board of the Wisconsin Association of Treatment Court Professionals since 2023.

Kevin Smith, U.W. 2019, is the Regional Attorney Manager for the Janesville region of the Office of the Wisconsin State Public Defender (SPD). He previously served the SPD as an Assistant State Public Defender, the Pretrial Motions Practice Coordinator, and a Local Attorney Manager. In his current role, Smith oversees SPD operations in Lafayette, Green, Rock, and Walworth Counties and represents indigent defendants in each of those counties, focusing on serious felony offenses. Smith is also an active trainer and educator.

Nick Smith has served as Agency Legal Counsel with the Office of the Wisconsin State Public Defender (SPD) since 2022. Smith started with the SPD as an Assistant State Public Defender in the Merrill trial office. In this role, he served as trial defense counsel for clients in felony, misdemeanor, and commitment matters. He also served on the Taylor County Hybrid Treatment Court. Before serving as an Assistant State Public Defender, Smith was on active duty as a Judge Advocate in the U.S. Coast Guard, where his assignments included being detailed as a Special Assistant U.S. Attorney for the District of Puerto Rico and as trial defense counsel at the Navy Defense Service Office Southeast in Norfolk, Virginia. Smith is a 2011 graduate of Marquette University School of Law. He received an undergraduate degree with majors in computer science and political science from Northern Illinois University.

Lucas Swank is an attorney with the Madison appellate office of the Office of the Wisconsin State Public Defender (SPD) and is one of the agency's Mental Health Practice Coordinators. Before joining the Madison appellate office, he practiced for five years in the Black River Falls trial office. He has presented for the SPD annual conference and local bar associations on various topics, including marijuana-odor litigation, involuntary medication in criminal competency restoration, and civil procedure for criminal defense lawyers.

Katie York is Deputy State Public Defender. She started with the Office of the Wisconsin State Public Defender (SPD) as an Assistant State Public Defender in the Green Bay trial office. In 2010, she transferred to the SPD's Madison appellate office, where she was later promoted to Local Attorney Manager. York has handled most SPD case types as both a trial attorney and an appellate attorney, litigating in circuit courts around the state, all four court of appeals districts, and the Wisconsin Supreme Court. In 2018, York became the Deputy Trial Division Director and in 2019 she returned to the Appellate Division as the Appellate Division Director, before becoming the Deputy State Public Defender and then the Acting State Public Defender. York was on the State Bar of Wisconsin's Board of Governors from 2017 to 2021. She has served as the SPD representative on the Wisconsin Judicial Council's Appellate Procedure Committee and is an advisory member on the Criminal Jury Instructions Committee.

Editorial Review Board for Seventh Edition

Sara Ward-Cassady is the director of administrative services with the Wisconsin State Public Defender (SPD), which she joined in 2018. Sara was previously a Principal Court Research Consultant for the National Center for State Courts and the Deputy Director of State Courts, Office of Court Operations, for the Wisconsin Court System. Sara holds a law degree from Marquette University and an undergraduate degree in journalism from the University of Wisconsin-Madison.

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Zachariah Fudge has been an assistant state public defender at the Wisconsin State Public Defender's La Crosse trial office since 2018. He previously worked at the Sparta trial office for four years. He earned his undergraduate degree in history from the University of Wisconsin and his law degree from Marquette University.

Eric Heywood is the training coordinator at the Wisconsin State Public Defender. He earned his undergraduate degree in mathematics from the University of Wisconsin-Madison and his law degree from the University of Wisconsin Law School.

Steve Hughes graduated from the University of Wisconsin Law School in 2015. Since then he primarily has practiced as a trial attorney for the Wisconsin State Public Defender's Eau Claire office. He currently serves on numerous statewide boards including the Wisconsin Association of Treatment Court Professionals and the Government Lawyers Division of the State Bar of Wisconsin. He also serves on numerous local committees participating in treatment courts, evidence-based practice committees, and local work groups. In his free time, he participates in triathlons and long-distance running.

Margaret Johnson is the racial disparity practice coordinator for the Wisconsin State Public Defender (SPD). Margaret assesses the presence of racial disparity in criminal justice systems and puts together the plan for addressing the disparity. Margaret has presented on issues surrounding racial disparity, including the race discussion circles, responding to racism, and implicit bias. Margaret has been a frequent presenter, including at the YWCA Madison's Circle of Women luncheon, the National Legal Aid and Defender Association Annual Conference, and the New York County Defender Services training. She regularly presents at the SPD's

Annual Conference and Trial Skills Academy. Margaret has been published in the State Bar of Wisconsin's *Wisconsin Juvenile Law Handbook*. She has been honored as a member of the Rubin Society of the SPD for her work with children. She is the proud recipient of the 2016 Chiarkas Award, presented by the SPD in recognition of her innovative leadership efforts. Margaret is currently in dissertator status working toward a Ph.D. in urban studies from the University of Wisconsin-Milwaukee. At Marquette University, Margaret completed her Juris Doctor and Master of Arts in public service with an administration of justice specialization. Margaret completed the YWCA Racial Justice Initiative Certificate program. She is the attorney manager and practices in the Racine trial office. Margaret is also a master-rated figure-skating coach.

Ellen Krahn is an assistant state public defender in the Madison appellate office of the Wisconsin State Public Defender. She represents clients in criminal appeals, children in delinquency cases, and parents in termination-of-parental-rights cases. She previously represented clients at the trial level. She earned her J.D. from the University of Wisconsin Law School in 2011 and her B.A. from St. Olaf College in 2006, both cum laude.

Suzanne C. O'Neill has been a trial attorney with the Wisconsin State Public Defender (SPD) since her graduation from De Paul University College of Law in 1991. During her career, she has represented indigent and vulnerable clients throughout north-central Wisconsin. She currently serves as the Deputy Trial Division Director for the SPD.

Jon Padgham serves as the deputy state public defender. A career public defender, Jon has worked in Wisconsin State Public Defender offices in Milwaukee, Lancaster, and Appleton. Over the years, he has had the pleasure of handling cases in 28 (and counting) Wisconsin counties.

Adam Plotkin is the legislative liaison for the Wisconsin State Public Defender (SPD). He represents the interests of the SPD, regarding legislation and policy initiatives, before the Wisconsin Legislature and executive and judicial branch agencies.

Gina M. Pruski is the director of training and development for the Wisconsin State Public Defender (SPD). After obtaining both her undergraduate and law degrees from the University of Wisconsin-Madison, she began her career with the SPD in 1992, serving first as a staff attorney in the Trial Division and then as legislative liaison for the agency. Gina was the 2016–17 chair of the National Alliance of Indigent Defense Educators (NAIDE)—the trainers' section of the National Legal Aid and Defender Association (NLADA)—and is currently an executive officer of NAIDE. She is a member of the National Association of Public Defense (NAPD) and serves on the NAPD's education committee, the NAPD academy advisory group, and the NAPD executive leadership institute focus group. She frequently conducts training for public defender trainers around the country. In 2017 and 2018, Gina served as a trainer consultant for NLADA for the MacArthur Foundation's Safety and Justice Challenge. In addition, on behalf of the U.S. State Department, Gina provided mentoring and technical assistance in the area of training and professional development to the Public Defender's Office in Armenia. In March 2018, she conducted train-the-trainer programs for criminal justice professionals in Yerevan. She has received extensive training in the area of racial justice facilitation, is one of the YWCA of Madison's Race to Equity project facilitators, and conducts workshops and presentations on the topic of unconscious bias for public defender offices around the United States and (in 2016, for the Criminal Lawyers' Association) in Canada. Other subjects for which she conducts training at the national level include poverty, cultural humility, public defender wellness, and leadership. She also serves on the board of directors for the Wisconsin Youth Company, is coauthor of the State Bar of Wisconsin's *Wisconsin Juvenile Law Handbook*, and is on the faculty for the skills intensive training of the lawyering skills course at the University of Wisconsin Law School. She also regularly volunteers as a judge for moot court and mock trial competitions at the University of Wisconsin Law School. Gina is a 2011 recipient of the Women in the Law honor bestowed by the *Wisconsin Law Journal*.

Vincent Rust is an assistant state public defender at the La Crosse trial office. He started as an investigator with the Wisconsin State Public Defender (SPD) in 1995 and became an attorney with the SPD in 2002. He is currently a Forensic Practice Coordinator for the SPD.

Nicholas Smith was an assistant state public defender at the Wisconsin State Public Defender's Merrill office.

Ben Szilagyi has worked as an assistant state public defender in the Oshkosh trial office since January 2011. He earned his undergraduate degree in political science from Utah State University and his law degree from Georgetown University Law Center.

How to Cite This Book

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[*See The Bluebook: A Uniform System of Citation* R.15, B15.1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).]

After the first full citation, you may cite this book as:

Wisconsin Criminal Defense Manual, *supra*, at § ____.

[*See The Bluebook: A Uniform System of Citation* R. 4.2(a), 15.10, B15.2 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).]

How to Use This Book

The *Wisconsin Criminal Defense Manual* is a collection of ideas and information designed to aid attorneys in handling criminal cases. It is neither a treatise on criminal law and procedure nor a complete criminal law system book. Rather, it seeks to combine basic criminal substantive law, procedure, and office systems into a versatile tutorial on criminal defense practice in Wisconsin.

The focus is on the defense of adult defendants in the state circuit courts. Many of the materials in this volume can easily be adapted for juvenile delinquency matters; however, attorneys representing clients in proceedings within Wis. Stat. ch. 48 or 938 are referred to Milton Childs et al., *Wisconsin Juvenile Law Handbook* (State Bar of Wis. 4th ed. 2017 & Supp.).

The Book's Organization

Chapter 1 serves initially as the point of entry into the book and thereafter as a reference tool. The Criminal Procedure Outline, *infra* §§ 1.2–.60, provides an overview of criminal procedure, from the first contact with the client through the decision whether to seek postconviction relief. The Checklist of Time Limitations, *infra* § 1.61, allows the attorney to quickly calculate the important deadlines in a case. Procedural checklists for the initial appearance, *infra* § 1.62, preliminary examination, *infra* § 1.63, plea negotiations, *infra* § 1.64, arraignment, *infra* § 1.65, trial, *infra* § 1.66, and sentencing hearing, *infra* § 1.67, can be duplicated and used at the appropriate stages of a case to help ensure that important matters are not overlooked.

Later chapters cover the different steps in a criminal case. The organization is not entirely chronological, however. The tips on file management and case analysis in chapters 2 and 4 will guide practice throughout the case. The user may want to consult the discussion of motion law and practice in chapter 5 (Bringing Pretrial Motions) before filing any of the motions discussed in other chapters. Preserving a client's appeal rights, covered in chapter 9, must be a priority throughout a case, not simply after conviction. And finally, any attorney accepting public defender cases should at the outset review the state public defender policies and procedures, outlined in chapter 10.

The Forms

The chapters include not only forms and correspondence used in the course of a criminal proceeding but also additional materials intended to assist or inform the client, such as instruction sheets. The commentary and instructions review the law and provide specific directions on when and how to use each form. Space is left at the end of the commentary for user notes (e.g., new case law; computer file names or file storage reference numbers; file locations for printed forms; office procedures; procedures specific to the county in which the attorney practices).

The user must adapt each nonmandatory form to fit the specific circumstances of each case. Several features assist with this task.

The Master Information List, or MIL (Form 3.111A), will aid the attorney in gathering basic information about the client and the facts of the case. The Quick Reference Guide to the Initial Interview in chapter 3, *infra* §§ 3.2–.110, provides guidance in completing the MIL. The information compiled on the MIL can be used to individualize the forms for the case.

The Office Master File (OMF), *see infra* p. How to Use-15, identifies those items of information that are most frequently required to fill in the blanks in the forms (e.g., client's name or date of birth). Each item in the OMF carries a numerical tag (e.g., 3.01) that appears in the forms wherever the information is required. Once an OMF is filled out for a particular client, the information needed to complete the forms is easily retrieved, whether by computer software that fills in the blanks automatically or by an office assistant working manually.

Alternative language appears throughout the nonmandatory forms to increase their versatility. Alternative words and phrases are italicized and enclosed in parentheses, with the alternatives separated by a slash mark; the user should select one of the alternatives and delete the others. Alternative and optional paragraphs are preceded by selection instructions and should be used as appropriate.

Online Forms

All forms and checklists in the *Manual* are provided online to save law firms the time and expense of inputting. For guidance on using the forms online, see page How to Use-3.

A Final Note

Some of the work in a criminal case may be carried out by a legal assistant, a paralegal, or an investigator. Attorneys should carefully consider how much of the work can safely be delegated, remembering that nonattorney assistants should never dispense legal advice.

Because the law changes rapidly, defense attorneys should *never* rely on this book as the sole authority. Attorneys should always check original sources of authority for current law and adapt nonmandatory form language to fit clients' circumstances.

Finally, it is important to remember that criminal practice and procedure may vary from county to county. Good practice requires checking local rules and procedures with the clerk of the court to which the case is assigned. The local public defender's office may also be a good source of information on local criminal practice and procedure.

Access to Downloadable Forms

To access your downloadable forms, please click here.

Office Master File

1.00 CAPTION

1.01	County
1.02	Case No.
1.03	Defendant's Name

2.00 FIRM/OFFICE

2.01 Attorney Handling Case
2.02 Attorney's State Bar No.
2.03 Firm/Office Name
2.04 Firm/Office Address
2.05 Firm/Office Telephone No.
2.06 Firm/Office File No.
2.07 Attorney's Email Address

3.00 CLIENT

3.01 Client's Name
3.02 Client's Address
3.03 Client's Telephone No.
3.04 Client's Date of Birth
3.05 Client's Social Security No.
3.06 Client's Email Address

4.00 PROSECUTOR

4.01 Prosecutor's Name
4.02 Prosecutor's Address

5.00 STATE PUBLIC DEFENDER (SPD)

5.01 SPD File No.

6.00 JUDGE

6.01 Assigned Judge
6.02 Courthouse Address

7.00 FACTS

7.01 Charges
7.02 Statute No(s).

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Chapter 1

Criminal Procedure Outline and Checklists

I. Introduction [§ 1.1]

This chapter serves as an overview of criminal procedure.[1]

The Criminal Procedure Outline presents a summary of criminal procedure, supported by citations to the statutes, case law, the *Wisconsin Judicial Benchbook—Criminal and Traffic* (State Bar of Wis. 7th ed. 2022 & Supp.), and helpful secondary sources. The outline covers the initial appearance, the preliminary examination, arraignment, pretrial motions, trial, sentencing, and postconviction motions and appeals.

The Time Limitations Checklist identifies, in chronological order, important criminal procedures subject to deadlines and explains how the deadlines are calculated, citing applicable statutes and referencing pertinent forms in the book. This checklist also appears in chapter 2, *infra*, as Form 2.4A; that version of the checklist provides space for the attorney to note the dates calculated for the specific case. Local court rules may establish other deadlines. The defense attorney should always check local practice.

Finally, this chapter includes procedural checklists for the initial appearance, preliminary examination, plea decision, arraignment, trial, and sentencing. The checklists for the plea decision, trial, and sentencing also appear (in modified form) in chapters 6, 7, and 8, *infra*, respectively.

II. Criminal Procedure Outline [§ 1.2]

Note. Sections 1.2–.60, *infra*, were originally written by Stephen M. Glynn and updated with the help of Craig W. Albee; they were adapted with the authors' permission from *Wisconsin Attorney's Desk Reference* (State Bar of Wis. 9th ed. 2020).

A. Introduction [§ 1.3]

1. In General [§ 1.4]

a. Defense of criminal cases is a specialized area of law with grave consequences for the client; attorneys should not take on the responsibility unless sufficiently experienced or willing to consult with criminal defense lawyers.

b. This chapter is not a substitute for a working knowledge of substantive criminal law—a subject not readily treated in checklist form. A helpful reference, however, is *Substantive Criminal Law: Cases and Materials* by Frank J. Remington, Walter J. Dickey, and David E. Schultz (2014–15).

c. Numerous helpful reference texts are available:

(1) *Wisconsin Judicial Benchbook, Vol. 1—Criminal and Traffic* (State Bar of Wis. 7th ed. 2022 & Supp.) [hereinafter *Benchbook*]

(2) *Wisconsin Jury Instructions—Criminal* [hereinafter Wis. JI—Crim.], available at https://wilawlibrary.gov/jury/

(3) Michael J. Brose et al., *The Wisconsin Rules of Evidence: A Courtroom Handbook* (State Bar of Wis. 11th ed. 2023 & Supp.)

(4) Christine M. Wiseman & Michael Tobin, *Wisconsin Practice—Criminal Practice and Procedure* (2d ed. 2008 & Supp. 2023) [hereinafter *Wisconsin Practice*]

d. All discussions in the outline except those relating to preliminary examinations, *see infra* §§ 1.14–.18, and timing of motions, *see infra* §§ 1.12, .13, .26, .40, apply to misdemeanors as well as felonies.

2. Ethical Considerations [§ 1.5]

a. A lawyer must provide competent representation to a client; competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. SCR 20:1.1.

b. Wisconsin test: Effective representation is what the ordinarily prudent lawyer, skilled and versed in criminal law, would give clients who had privately retained the lawyer's services. *State v. Schaefer*, 2008 WI 25, ¶ 89, 308 Wis. 2d 279, 746 N.W.2d 457; *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973).

c. A lawyer must keep a client reasonably informed of the status of the case, promptly comply with reasonable client requests for information, and explain matters to the client to enable the client to make informed decisions throughout the case, including, but not limited to, advising the client of all settlement offers. SCR 20:1.4.

Practice Tip. Consistent communication with a client helps form good working relationships with clients. Clients will generally feel an attorney is advocating diligently for them when they are kept informed of the progress or lack of progress in their cases. *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

d. A lawyer must not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and as directed in the Supreme Court Rules of Professional Conduct. SCR 20:1.6.

Practice Tip. Interview clients without others present. Advise parents of juvenile clients that the rules require an attorney to speak with a client alone, but that the attorney will answer questions from parents after the client interview. Advise clients not to speak with others concerning their cases.

e. A lawyer must not represent a client if the representation will be directly adverse to another client, SCR 20:1.7(a), unless:

(1) The lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client, and

(2) Each client consents in writing after consultation.

f. A lawyer must not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, SCR 20:1.7(b), unless:

(1) The lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client, and

(2) The client consents in writing after consultation.

g. A lawyer who has formerly represented a client in a matter must not represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation. SCR 20:1.9(a).

h. A lawyer must not use confidential information relating to the representation of a client to the disadvantage of a former client. SCR 20:1.9(c).

Practice Tip. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. Moreover, conflicts of interest for one lawyer are generally imputed to other lawyers associated in the same firm. SCR 20:1.10; SCR 20:1.7 (comment).

B. Initial Appearance [§ 1.6]

1. Court's Function [§ 1.7]

a. To inform defendant of charges and provide defendant with complaint. Wis. Stat. § 970.02.

b. To inform defendant of right to counsel (if defendant is unrepresented).

c. To determine defendant's conditions of release. Wis. Stat. ch. 969.

d. In misdemeanor cases, to arraign defendant.

e. To set date for next proceeding.

(1) Misdemeanor: Trial date, if defendant requests, within 60 days; court may schedule a pretrial hearing or motion hearing before trial. Wis. Stat. §§ 970.02(3), 971.10(1).

(2) Felony: Preliminary examination required within 10 days after initial appearance, if defendant in custody and bail has been fixed in excess of $500, or within 20 days, if defendant not in custody; time may be extended by stipulation or motion on cause shown. Wis. Stat. §§ 970.02(5), 970.03(2); *State v. Lee*, 2021 WI App 12, ¶ 59, 396 Wis. 2d 136, 955 N.W.2d 424.

Note. In some cases, a bail hearing occurs before the criminal complaint has been prepared. In these cases, some of the above-listed functions of the initial appearance are not addressed until the next hearing.

2. Defense Motions and Demands [§ 1.8]

a. Determine defendant's competency to proceed. Wis. Stat. §§ 971.13–.14.

(1) Raise if there is reason to doubt defendant's competency; this issue may also be raised at later stages of proceedings.

(2) Burden is on state to disprove defendant's assertion of competency or incompetency. Wis. Stat. § 971.14(4).

(3) When attorney has reason to doubt defendant's competency, failure to raise issue of defendant's competency constitutes ineffective assistance of counsel. *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986).

(4) Despite attorney's obligation to raise issue of competency, ethics rule on confidentiality limits attorney's authority to disclose specific facts. SCR 20:1.6; *State v. Meeks*, 2003 WI 104, ¶¶ 45–46, 263 Wis. 2d 794, 666 N.W.2d 859.

(5) Request that competency evaluation be done on an outpatient basis, if possible. Wis. Stat. § 971.14(2).

b. Challenge orally (or orally reserve right to challenge later in writing) court's jurisdiction over person of defendant on such grounds as sufficiency of complaint. *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 438–40, 173 N.W.2d 175 (1970).

c. Secure client's release pending further proceedings, preferably on nonmonetary conditions of release. Factors set forth in Wis. Stat. § 969.01(1)(b)2. And (4) address ensuring defendant's appearance and protecting the community.

d. Request preliminary examination if client charged with felony, *see infra* §§ 1.14–.18. Wis. Stat. § 970.02(4), (5).

(1) Because of discovery opportunity and possibility that state cannot meet its burden, general rule is not to waive preliminary hearing.

(2) Exceptions (reasons to consider waiving preliminary hearing):

(i) To avoid preservation of testimony.

(ii) To avoid opportunity for prosecution witnesses to undergo cross-examination before trial.

(iii) To receive exceptional discovery or other favors from prosecutor.

(iv) To minimize risk of additional charges being filed.

3. Request for Substitution of Judge [§ 1.9]

Wis. Stat. § 971.20.

a. Defense must file written substitution request before making any motion to circuit court and before arraignment. Wis. Stat. § 971.20(4); *State ex rel. Davis v. Circuit Ct.*, 2024 WI 14, 411 Wis. 2d 123, 4 N.W.3d 273; *State ex rel. Tinti v. Circuit Ct.*, 159 Wis. 2d 783, 789, 464 N.W.2d 853 (Ct. App. 1990).

b. Generally, defense has right to only one substitution of judge. Wis. Stat. § 971.20(2), (5), (7).

c. Chief Judge for district assigns new judge following substitution. Wis. Stat. §§ 971.20(8), 751.03.

C. Motions After Initial Appearance [§ 1.10]

1. Motions Defined [§ 1.11]

a. Motions should ordinarily be in writing, stating with particularity the grounds and the order or relief sought and filed and served on the prosecutor five days before the time scheduled for hearing. Wis. Stat. §§ 971.30, 801.15(4).

b. If time is insufficient for written motion, may make motion orally on record.

2. Motions in Misdemeanor Cases [§ 1.12]

a. In misdemeanor cases, motions before trial must generally be filed within 10 days after initial appearance. Wis. Stat. § 971.31(5)(a).

b. Notwithstanding 10-day time limit, defendant is entitled to hearing on date of trial, outside jury's presence, on admissibility of defendant's statement. Wis. Stat. § 971.31(3).

c. *See infra* §§ 1.26, .40.

3. Motions in Felony Cases Before Preliminary Examination [§ 1.13]

a. Motions seeking modification of conditions of release should be considered if client still incarcerated. Wis. Stat. § 969.08.

b. Motions challenging sufficiency of complaint must be brought before preliminary examination or may be waived. Wis. Stat. § 971.31(5)(c). Grounds for motion include the following:

(1) Complaint fails to relate essential facts. Wis. Stat. §§ 968.01(2), 970.02(1)(a); *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12 (1971); *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 230, 161 N.W.2d 369 (1968).

(2) Complaint contains unreliable information. Wis. Stat. § 968.01; *Illinois v. Gates*, 462 U.S. 213 (1983).

(3) Complaint contains intentional or reckless misstatements, or crucial facts have been intentionally or recklessly omitted from factual portion; motion *must* be supported by affidavit or other reliable statement based on personal knowledge. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978); *State v. Mann*, 123 Wis. 2d 375, 388–89, 367 N.W.2d 209 (1985); *State v. Bruckner*, 151 Wis. 2d 833, 864–65 n.15, 447 N.W.2d 376 (Ct. App. 1989).

c. Defense may bring motion challenging personal jurisdiction on grounds such as failure to begin preliminary examination within statutory time limits. Wis. Stat. § 970.03(2); *Logan v. State*, 43 Wis. 2d 128, 138, 168 N.W.2d 171 (1969).

d. Request for substitution of judge assigned to preliminary examination must be in writing, and exhausts the right to substitution for the duration of the action. Wis. Stat. § 971.20(3)(b).

D. Preliminary Examination [§ 1.14]

See generally Benchbook CR 9.

1. Purpose [§ 1.15]

See Wis. Stat. § 970.03; *State v. Dunn*, 121 Wis. 2d 389, 394–95, 359 N.W.2d 151 (1984).

a. Purpose is to determine if there is probable cause to believe defendant committed a felony.

b. Right to preliminary examination is statutory, not constitutional. *State v. Williams*, 198 Wis. 2d 516, 525, 544 N.W.2d 406 (1996).

c. Probable-cause level for bindover is greater than that required for issuing arrest warrant. *State v. Berby*, 81 Wis. 2d 677, 683, 260 N.W.2d 798 (1978); *State v. Kittilstad*, 222 Wis. 2d 204, 209, 585 N.W.2d 925 (Ct. App. 1998), *aff'd*, 231 Wis. 2d 245, 603 N.W.2d 732 (1999).

d. Preliminary examination is technically not for discovery; however, discovery is greatest utility of preliminary examination for defense. *State v. Schaefer*, 2008 WI 25, ¶¶ 3, 95, 308 Wis. 2d 279, 746 N.W.2d 457; *State v. Knudson*, 51 Wis. 2d 270, 281, 187 N.W.2d 321 (1971).

2. Conduct of Preliminary Examination [§ 1.16]

a. Evidentiary proceeding; therefore, defendant's physical presence required unless waived. Wis. Stat. §§ 971.04(1)(d), 967.08.

b. Presumptively public, although may be closed under limited circumstances; complainant's wishes are an important consideration when closure is an option. Wis. Stat. § 970.03(4); *State ex rel. Stevens v. Circuit Ct.*, 141 Wis. 2d 239, 414 N.W.2d 832 (1987).

c. Witnesses sworn and transcript made. Wis. Stat. § 970.03(5).

d. Rules of evidence generally apply, with the major exception that hearsay is admissible in a preliminary examination. Court may base its finding of probable cause in whole or in part on hearsay evidence. Wis. Stat. §§ 911.01, 970.03, 970.038; *State v. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8.

3. Defendant's Rights at Preliminary Examination [§ 1.17]

a. Sequestration and exclusion of witnesses. Wis. Stat. §§ 906.15(1), 970.03(6). *But see* Wis. Const. art. I, § 9m(2) (Marsy's Law) (granting victims the right to attend all proceedings involving the case); Rebecca M. Donaldson et al., *Marsy's Law: Changes for Crime Victims?*, Wis. Law., Sept. 2020.

b. Cross-examination of state witnesses and presentation of defense witnesses. Wis. Stat. § 970.03(5).

c. Examination to lay basis for future suppression motions, especially regarding defendant's identification. *Hayes v. State*, 46 Wis. 2d 93, 99, 175 N.W.2d 625 (1970), *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). *But see Wilson v. State*, 59 Wis. 2d 269, 292–95, 208 N.W.2d 134 (1973) (holding cross-examination in preliminary examination properly limited to plausibility of story and not general trustworthiness of witnesses).

d. Defendant does not have a constitutional right to make a closing argument at the conclusion of the preliminary examination. *State ex rel. Funmaker v. Klamm*, 106 Wis. 2d 624, 635, 317 N.W.2d 458 (1982).

e. Defendant does not have a constitutional right to confrontation at pretrial proceedings. The preliminary-hearing finding of probable cause may be based entirely on hearsay evidence. The state's ability to satisfy its burden with hearsay, however, is not absolute. The defense may challenge overreliance on hearsay at the preliminary hearing as a due-process violation of the right to a fair trial. *State v. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8.

4. Dismissal at Preliminary Examination [§ 1.18]

See Wittke v. State ex rel. Smith, 80 Wis. 2d 332, 348, 259 N.W.2d 515 (1977). *But see State v. Brown*, 96 Wis. 2d 258, 270, 291 N.W.2d 538 (1980).

a. Court must dismiss action if no probable cause as to any crime. Wis. Stat. § 970.03(9).

b. When multiple counts are transactionally related, court must bind over defendant on all counts if state establishes probable cause that a felony was committed (as to any count). Wis. Stat. § 970.03(10); *State v. Williams*, 198 Wis. 2d 479, 544 N.W.2d 400 (1996).

c. Court must reduce charge if showing only of probable cause for misdemeanor. Wis. Stat. § 970.03(8).

d. State may reissue dismissed charge in new complaint, based on new or unused evidence, subject to fair-play doctrine. Wis. Stat. § 970.04; *State v. Brown*, 96 Wis. 2d 258, 266–67, 291 N.W.2d 538 (1980); *State v. Johnson*, 231 Wis. 2d 58, 65, 604 N.W.2d 902 (Ct. App. 1999).

E. Arraignment [§ 1.19]

1. Main Purposes of Arraignment [§ 1.20]

See Wis. Stat. § 971.05.

a. To advise defendant of the right to an attorney

b. To ensure that defendant has received the formal charging document

c. To have defendant enter a plea to the charge(s)

2. Substitution of Judge [§ 1.21]

See Wis. Stat. § 971.20; *supra* § 1.9.

3. Prearraignment Motions [§ 1.22]

a. Prearraignment motions must raise certain issues to preserve them, including the following:

(1) Lack of personal jurisdiction (even if raised earlier, should be raised again to preserve issue for review). *Armstrong v. State*, 55 Wis. 2d 282, 285–86, 198 N.W.2d 357 (1972).

(2) Untimely preliminary examination. *Logan v. State*, 43 Wis. 2d 128, 139, 168 N.W.2d 171 (1969).

(3) Insufficiency of evidence presented at preliminary examination. *State ex rel. Dowe v. Circuit Ct. for Waukesha Cnty.*, 184 Wis. 2d 724, 733–34, 516 N.W.2d 714 (1994); *Wold v. State*, 57 Wis. 2d 344, 346, 204 N.W.2d 482 (1973); *State v. Cotton*, 2003 WI App 154, ¶¶ 11–16, 266 Wis. 2d 308, 668 N.W.2d 346.

Note. A defendant may not obtain relief for errors at the preliminary examination after trial. Appellate relief for a defective preliminary examination may only be obtained through a permissive interlocutory appeal before trial. *State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991).

(4) Untimely filing of information. Wis. Stat. § 971.01(2); *State v. Phillips*, 2000 WI App 184, ¶¶ 7–10, 238 Wis. 2d 279, 617 N.W.2d 522.

(5) Insufficiency of information. *State v. Russo*, 70 Wis. 2d 169, 173–74, 233 N.W.2d 485 (1975).

Note. If an error truly affects subject-matter jurisdiction, it may be possible to raise it later. However, this approach is risky and ill advised. *State v. Powers*, 2004 WI App 156, ¶ 7 n.5, 276 Wis. 2d 107, 687 N.W.2d 50.

(6) Counts alleged in information "wholly unrelated" to the facts elicited at preliminary examination. *State v. Williams*, 198 Wis. 2d 479, 483, 544 N.W.2d 400 (1996); *Powers*, 2004 WI App 156, ¶ 7 n.5, 276 Wis. 2d 107.

(7) Insufficiency of complaint (even if raised earlier, should be raised again to preserve issue for review). *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175 (1970).

(8) Substitution of judge originally assigned to trial (if no earlier substitution made). Wis. Stat. § 971.20(4).

(9) Change-of-venue motion. Wis. Stat. §§ 971.22, 971.223.

(i) Must be made at arraignment unless cause exists for later motion. Wis. Stat. § 971.22(1).

(ii) Must be in writing and supported by evidentiary affidavit. Wis. Stat. § 971.22(2); *State ex rel. Hussong v. Froelich*, 62 Wis. 2d 577, 593, 215 N.W.2d 390 (1974).

(iii) Factors to be considered discussed in case law. *Tucker v. State*, 56 Wis. 2d 728, 733–36, 202 N.W.2d 897 (1973); *State v. Ritchie*, 2000 WI App 136, ¶ 23, 237 Wis. 2d 664, 614 N.W.2d 837.

(iv) Court may select jury in another county and then return to original county for trial. Wis. Stat. § 971.225.

b. If time is insufficient to prepare motions before arraignment (e.g., arraignment is on same day as preliminary examination), defense attorney should reserve right to bring motions later.

4. Conduct of Arraignment [§ 1.23]

a. Defendant must be physically present unless waived. Wis. Stat. §§ 971.04(1)(a), 967.08.

b. Must be in open court, although may be either in trial court or, in felonies, preliminary-examination court or, in misdemeanors, initial-appearance court. Wis. Stat. § 971.05(intro.), (1).

c. Defendant entitled to receive copy of information in felony cases and entitled to have information read aloud (unless defendant waives the reading). Wis. Stat. § 971.05(3).

d. Defendant may enter one of the following pleas (two, if bifurcated-trial procedure is invoked), Wis. Stat. § 971.06(1), (2):

(1) Guilty;

(2) Not guilty (silence treated as not guilty);

(3) No contest (subject to court approval); *or*

(4) Not guilty by reason of mental disease or defect, which triggers statutory procedures for mental-status examination(s) and, if accompanied by a plea of not guilty, for bifurcated trial. Wis. Stat. §§ 971.16, 971.165.

e. Entry of guilty plea pursuant to plea bargain must include waiver of rights on record. *State v. Brown*, 2006 WI 100, ¶ 52, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bangert*, 131 Wis. 2d 246, 267–68, 389 N.W.2d 12 (1986).

5. Speedy Trial Rights [§ 1.24]

See Wis. Stat. § 971.10(1), (2)(a), (4).

a. Misdemeanor: Trial within 60 days after initial appearance. Wis. Stat. § 971.10(1).

b. Felony: Trial within 90 days after demand made in writing or orally on the record. Wis. Stat. § 971.10(2)(a).

c. Upon demand for speedy trial, the court may grant a continuance only by setting forth on the record its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial. Wis. Stat. § 971.10(3).

d. Remedy for statutory violation is discharge from custody, but the obligations and conditions of bond continue until modified or removed. Wis. Stat. § 971.10(4).

e. Constitutional right: Balancing test focusing on four factors (length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant). *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324.

f. Entry of guilty plea waives violation of the right to a speedy trial. *State v. Asmus*, 2010 WI App 48, 324 Wis. 2d 427, 782 N.W.2d 435.

F. Pretrial Motions to Dismiss [§ 1.25]

1. When Motions Must Be Brought [§ 1.26]

See Wis. Stat. §§ 971.31(5), 801.15(4).

a. Misdemeanor: Within 10 days after initial appearance, unless court permits otherwise.

b. Felony: Within 10 days after arraignment, unless court permits otherwise.

c. A written motion and notice of hearing must be filed and served at least five days before the scheduled hearing.

2. Defects in Complaint or Information [§ 1.27]

Wis. Stat. § 971.31(5)(c); *State v. Christensen*, 110 Wis. 2d 538, 542, 329 N.W.2d 382 (1983).

a. Failure to state material elements or failure to charge offense. *State v. Petrone*, 161 Wis. 2d 530, 557–58, 468 N.W.2d 676 (1991), *overruled in part on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

Note. Absent a showing of actual prejudice, an information that fails to set forth all elements of a charge, whether statutorily or judicially mandated, is nonetheless sufficient if the pleading includes a correct citation to the applicable criminal statute.

b. Failure to allege offense with sufficient detail to allow accused to prepare defense. *State v. Stark*, 162 Wis. 2d 537, 544–45, 470 N.W.2d 317 (Ct. App. 1991).

c. Multiplicity: Charging single offense in more than one count. *State v. Davison*, 2003 WI 89, ¶¶ 27–45, 263 Wis. 2d 145, 666 N.W.2d 1; *State v. Nommensen*, 2007 WI App 224, ¶¶ 5–8, 305 Wis. 2d 695, 741 N.W.2d 481.

d. Duplicity: Charging more than one offense in single count. *State v. Glenn*, 199 Wis. 2d 575, 584, 545 N.W.2d 230 (1996); *State v. Tappa*, 127 Wis. 2d 155, 169, 378 N.W.2d 883 (1985).

e. Failure to negate existence of statutory exception to crime (provided exception is an element). *State v. Olson*, 106 Wis. 2d 572, 580–81, 317 N.W.2d 448 (1982). *But see Petrone*, 161 Wis. 2d 530.

3. Unconstitutionality of Charged Statute [§ 1.28]

a. Circuit court has authority to decide constitutional questions. *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 24–26, 201 N.W.2d 761 (1972).

b. Wisconsin free to apply higher constitutional standard when interpreting Wisconsin Constitution than federal courts do when interpreting U.S. Constitution. *State v. Field*, 118 Wis. 2d 269, 285, 347 N.W.2d 365 (1984).

c. Parallel Wisconsin provisions exist for many federal constitutional rights. *See, e.g.*, Wis. Const. art. I, § 3 (First Amendment parallel); Wis. Const. art. I, § 25 (Second Amendment parallel); Wis. Const. art. I, § 11 (Fourth Amendment parallel); Wis. Const. art. I, § 8(2) (parallel to Eighth Amendment right to reasonable bail).

d. Constitutional challenges to the charged statute may be based on such matters as free speech, self-incrimination, vagueness, or equal protection. *State v. Hall*, 207 Wis. 2d 54, 67, 557 N.W.2d 778 (1997); *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985); *State v. Lynch*, 2006 WI App 231, ¶¶ 10–21, 297 Wis. 2d 51, 724 N.W.2d 656.

e. Guilty plea waives an "as applied" challenge but not a facial challenge to constitutionality. *State v. Bush (In re Commitment of Bush)*, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80.

f. Copy of motion must be served on state attorney general and others. Wis. Stat. § 806.04(11).

g. Courts may interpret a criminal statute narrowly to avoid conflict with constitutional right. *State v. Hamdan*, 2003 WI 113, ¶ 39, 264 Wis. 2d 433, 665 N.W.2d 785.

4. Double Jeopardy [§ 1.29]

See Wis. Stat. § 939.71; *State v. Sepulveda*, 119 Wis. 2d 546, 350 N.W.2d 96 (1984).

a. Types of double jeopardy:

(1) Retrial after mistrial, *State v. Seefeldt*, 2003 WI 47, ¶ 19, 261 Wis. 2d 383, 661 N.W.2d 822.

(2) Retrial after conviction or acquittal, *United States v. Dixon*, 509 U.S. 688 (1983); *State v. Kurzawa*, 180 Wis. 2d 502, 524–25, 509 N.W.2d 712 (1994).

(3) Retrial after conviction or acquittal in another jurisdiction, Wis. Stat. §§ 939.71, 961.45 (drug cases); *State v. Hansen*, 2001 WI 53, ¶ 1, 243 Wis. 2d 328, 627 N.W.2d 195; *State v. Lasky*, 2002 WI App 126, ¶¶ 9–10, 254 Wis. 2d 789, 646 N.W.2d 53.

(4) Multiplicity, *see supra* § 1.27.

b. Interlocutory appeal available for reviewing denial of motion to dismiss based on double jeopardy. *State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114 (1980); *see* Wis. Stat. §§ 808.03(2), 809.50.

5. Selective or Discriminatory Prosecution [§ 1.30]

Equal protection challenge to charging decision; defense must show prosecution had a discriminatory effect and was initiated for a discriminatory purpose. *State v. Kramer*, 2001 WI 132, ¶¶ 14–18, 20, 248 Wis. 2d 1009, 637 N.W.2d 35; *Sears v. State*, 94 Wis. 2d 128, 135, 287 N.W.2d 785 (1980).

6. Vindictive or Retaliatory Prosecution [§ 1.31]

Equal-protection or due-process challenge; defense must show personal vindictiveness of prosecutor or retaliation for exercise of constitutional rights. In pretrial negotiations, prosecutor is allowed to threaten to increase the charges if the defendant insists on a trial. *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978); *Blackledge v. Perry*, 417 U.S. 21, 27–28 (1974).

7. Undue Precharging Delay [§ 1.32]

See United States v. Lovasco, 431 U.S. 783, 789–90 (1977); *State v. Blanck*, 2001 WI App 288, ¶¶ 19–20, 249 Wis. 2d 364, 638 N.W.2d 910.

a. Delay in bringing indictment or petition against defendant may violate due process.

b. Defendant must show prejudice to self, tactical advantage to prosecution, or harassment.

8. Collateral Estoppel (Issue Preclusion) [§ 1.33]

Double-jeopardy challenge to prosecutor's attempt to relitigate an issue previously decided. *State v. Canon*, 2001 WI 11, ¶¶ 12–13, 241 Wis. 2d 164, 622 N.W.2d 270.

9. Statute of Limitation [§ 1.34]

Statutory time limit between date of offense and commencement of criminal case. Wis. Stat. § 939.74. A case is commenced with the issuance of a warrant or summons, an indictment finding, or the filing of an information. Prosecutions for a misdemeanor and for adultery must commence within three years. Prosecutions for a felony must generally commence within six years. Exceptions are outlined in Wis. Stat. § 939.74(2).

10. Immunity [§ 1.35]

Statutory ground for exclusion of evidence derived from court order compelling defendant to testify or to produce documents. Wis. Stat. § 972.085.

11. Improper Venue [§ 1.36]

Subject to statutory exceptions, criminal trial must occur in county where crime occurred. Wis. Stat. §§ 971.19, 971.22, 971.223.

12. Outrageous Government Conduct [§ 1.37]

Due process challenge to law-enforcement tactics that are fundamentally unfair and constitute an abuse of power. This challenge focuses exclusively on governmental misconduct, in contrast to an entrapment defense, which hinges on whether defendant was predisposed to commit offense. *Hampton v. United States*, 425 U.S. 484, 488–89 (1976); *State v. Hyndman*, 170 Wis. 2d 198, 208–09, 488 N.W.2d 111 (Ct. App. 1992).

13. Beyond Court's Authority (e.g., Juvenile in Adult Court) [§ 1.38]

See H.N.T. v. State (In re H.N.T.), 125 Wis. 2d 242, 371 N.W.2d 395 (Ct. App. 1985).

G. Other Pretrial Motions and Demands [§ 1.39]

1. When Motions Must Be Brought [§ 1.40]

a. Misdemeanor: Within 10 days after initial appearance, unless court permits otherwise. Wis. Stat. §§ 971.31(5), 801.15(4).

b. Felony: Within 10 days after arraignment, unless court permits otherwise. Wis. Stat. §§ 971.31(5), 801.15(4).

c. A written motion and notice of hearing must be filed and served at least five days before the scheduled hearing. Wis. Stat. § 801.15(4).

2. Statutory Discovery and Disclosure [§ 1.41]

See Benchbook CR 10.

a. Defendant's statements, Wis. Stat. § 971.23(1)(a), (b); *State v. DeLao*, 2002 WI 49, ¶¶ 25–50, 252 Wis. 2d 289, 643 N.W.2d 480; *State v. Ruiz*, 118 Wis. 2d 177, 196–97, 347 N.W.2d 352 (1984).

(1) State must produce written and oral statements, on demand, before trial.

(2) If state plans to use statements in trial, state must disclose names of witnesses to statements.

(3) Disclosure not limited to statements made to law-enforcement officers. *Kutchera v. State*, 69 Wis. 2d 534, 545, 230 N.W.2d 750 (1975).

b. Prior criminal records.

(1) State must produce defendant's record, on demand, before trial. Wis. Stat. § 971.23(1)(c).

(2) State must produce records of prosecution witnesses on demand. Wis. Stat. § 971.23(1)(f); *State v. Rice*, 2008 WI App 10, ¶ 19 n.5, 307 Wis. 2d 335, 743 N.W.2d 517.

c. Reciprocity: discovery statutes are reciprocal, and absent constitutional or statutory rules protecting against disclosure, defense must honor prosecution's demand for items specified in Wis. Stat. § 971.23(2m). Prosecution may also move for scientific testing of evidence in possession of defense. Wis. Stat. § 971.23(2m); *State v. Gribble*, 2001 WI App 227, ¶¶ 20–27, 248 Wis. 2d 409, 636 N.W.2d 488; *State v. Revels*, 221 Wis. 2d 315, 585 N.W.2d 602 (Ct. App. 1998).

d. List of witnesses. Wis. Stat. § 971.23(1)(d), (2m)(a); *Caccitolo v. State*, 69 Wis. 2d 102, 116, 230 N.W.2d 139 (1975); *State v. Konkol*, 2002 WI App 174, ¶ 15, 256 Wis. 2d 725, 649 N.W.2d 300.

(1) Each party must produce list of witnesses and their addresses on demand; the list need not include rebuttal witnesses or those called for impeachment only.

(2) If prosecutor lists numerous witnesses, ask court to require specification of those actually intended to be called. *Irby v. State*, 60 Wis. 2d 311, 319, 210 N.W.2d 755 (1973).

(3) If a party wants to exclude a witness from list, protective order must be obtained. Wis. Stat. § 971.23(6).

(4) As new witnesses are discovered, parties have continuing duty to disclose. Wis. Stat. § 971.23(7); *Rice*, 2008 WI App 10, ¶ 13, 307 Wis. 2d 335.

e. Statements of witnesses. Wis. Stat. § 971.23(1), (2m).

(1) Each party must produce written or recorded witness statements on demand.

(2) Statements must be produced within a reasonable time before trial.

(3) Discovery statute applies only to party calling witness, not to adversary; evidence code requires production of statement, upon request, after witness has been examined about statement. Wis. Stat. §§ 906.13(1), 973.23(1), (2m).

(4) Attorney's or investigator's notes of a witness interview are not discoverable statements. *State v. Nelis*, 2007 WI 58, ¶ 37, 300 Wis. 2d 415, 733 N.W.2d 619; *State v. Hereford*, 195 Wis. 2d 1054, 1075–76, 537 N.W.2d 62 (Ct. App. 1995).

f. Inspection of physical evidence: state must produce, on demand, any physical evidence that the prosecutor intends to use at trial. Wis. Stat. § 971.23(1)(g).

g. Expert witnesses and scientific tests. Wis. Stat. § 971.23(1)(e).

(1) On demand, defendant entitled to expert reports and results of scientific tests; if expert did not prepare report, defendant entitled to written summary of expert's findings or subject matter of testimony. *Id.*; *State v. Schroeder*, 2000 WI App 128, ¶¶ 8–9, 237 Wis. 2d 575, 613 N.W.2d 911.

(2) On motion, court may order production of physical evidence for scientific testing. Wis. Stat. § 971.23(5).

(3) Specific procedure for evidence related to DNA testing. Wis. Stat. § 971.23(9).

(4) Defendant may seek testing by State Crime Laboratory. Wis. Stat. § 165.79(1).

h. Sanctions for nondisclosure: Failure to comply with discovery rules leads to exclusion unless good cause is shown for failure to comply; inadequate trial preparation does not justify nonproduction of discovery materials. Wis. Stat. § 971.23(7m); *DeLao*, 2002 WI 49, ¶ 51, 252 Wis. 2d 289; *State v. Long*, 2002 WI App 114, ¶ 33, 255 Wis. 2d 729, 647 N.W.2d 884.

i. Notice of alibi. Wis. Stat. §§ 971.23(8), 971.31(8).

(1) The defendant must give the state notice of intent to rely on an alibi at arraignment or at least 30 days before trial. Notice must state the place defendant claims to have been when the crime allegedly occurred and provide the names and addresses of known alibi witnesses.

(2) Alibi evidence is inadmissible in absence of notice, unless court permits for cause.

(3) Within 20 days after receipt of defendant's notice of alibi, or as ordered by the court, the state must provide notice to defense of the names and addresses, if known, of witnesses to be offered in rebuttal to alibi.

(4) Rebuttal evidence of alibi is inadmissible in absence of notice, unless the court permits for cause.

(5) The state cannot comment on defendant's withdrawal of alibi defense or failure to call some or all alibi witnesses. The state cannot call any alibi witness not called by the defendant to impeach the defendant's credibility regarding the alibi notice.

(6) Statute may be unconstitutional if applied to exclude defendant's testimony. *Alicea v. Gagnon*, 675 F.2d 913, 925 (7th Cir. 1982).

3. Disclosure of Exculpatory Evidence [§ 1.42]

See Kyles v. Whitley, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963).

a. State has duty to disclose to defense any evidence within its possession or control favorable to the defendant. *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468. Defense should seek exculpatory evidence by particularized demand.

(1) Prosecution must disclose material specifically requested. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737.

(2) General demand is little better than no demand. *See State v. Ruiz*, 118 Wis. 2d 177, 189, 347 N.W.2d 352 (1984).

b. Includes evidence affecting credibility of witness when reliability of witness may determine guilt or innocence. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80.

c. Demand extends to prosecution agencies and instrumentalities, such as police departments. *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995); *State v. DeLao*, 2002 WI 49, ¶ 24, 252 Wis. 2d 289, 643 N.W.2d 480.

d. Statute requires disclosure with sufficient time for effective use of exculpatory evidence; although due process does not compel disclosure of exculpatory information before plea negotiations, statutory violation may constitute basis to withdraw plea. *Harris*, 2004 WI 64, ¶¶ 2, 37, 272 Wis. 2d 80.

e. Confidential records may be subject to in camera review by court (e.g., complainant's past mental-health treatment records, employment records, social service records), and ultimate disclosure to defense. Although *State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174, overruled *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and other cases that applied *Shiffra*, such as *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, the defendant's constitutional right to present a defense may nonetheless outweigh application of a privilege statute. *See, e.g.*, *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777.

Note. Juvenile court retains control of juvenile records and is the appropriate jurisdiction to entertain a request for in camera inspection of those records. *See, e.g.*, *State v. Bellows*, 218 Wis. 2d 614, 582 N.W.2d 53 (Ct. App. 1998).

f. State has privilege to protect identity of confidential informant, but privilege must give way if defendant shows that informant's testimony is necessary to defense. Wis. Stat. § 905.10; *State v. Vanmanivong*, 2003 WI 41, ¶¶ 18–20, 261 Wis. 2d 202, 661 N.W.2d 76.

4. Suppression of Evidence [§ 1.43]

a. Statements

(1) Statements should be challenged on voluntariness as well as *Miranda* and right-to-counsel grounds, as appropriate; challenge on one ground does not incorporate challenge on the others. *Montejo v. Louisiana*, 556 U.S. 778, 792–97 (2009); *State v. Delebreau*, 2015 WI 55, ¶¶ 58–60, 362 Wis. 2d 542, 864 N.W.2d 852; *State v. Jiles*, 2003 WI 66, ¶ 25, 262 Wis. 2d 457, 663 N.W.2d 798; *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997).

(2) Custodial interrogations of juveniles must be recorded when feasible; state policy is to record such interrogations of all felony suspects. Wis. Stat. §§ 968.073, 972.115; *State v. Jerrell C.J. (In re Jerrell C.J.)*, 2005 WI 105, ¶ 58 & n.15, 283 Wis. 2d 145, 699 N.W.2d 110.

(3) Procedures described in other sources. *Benchbook* CR 21; *Wisconsin Practice* §§ 20.13–.14.

b. Physical evidence illegally seized or searched. *Benchbook* CR 19; *see State v. Harris*, 206 Wis. 2d 243, 263, 557 N.W.2d 245 (1996).

c. Identification procedures. *Benchbook* CR 20; *State v. Roberson*, 2019 WI 102, ¶¶ 81–82, 389 Wis. 2d 190, 935 N.W.2d 813 (reliability is linchpin in determining admissibility of identification testimony).

d. Wiretap evidence. Wis. Stat. § 968.30(9)(a).

e. Other evidence derived from illegal or unconstitutional governmental actions (fruit of the poisonous tree). *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998).

f. Defense must allege sufficient material facts to require an evidentiary hearing. *State v. Samuel*, 2002 WI 34, ¶¶ 35–36, 252 Wis. 2d 26, 643 N.W.2d 423.

5. Severance of Crimes or Defendants [§ 1.44]

See Wis. Stat. § 971.12; *Benchbook* CR 18.

a. More than one crime may be joined in the same complaint or information when the crimes charged are of the same or similar character, the crimes charged are based on the same act or transaction, or the crimes charged are based on two or more acts and the acts are either connected together or constitute parts of a common plan. Wis. Stat. § 971.12.

b. When crimes are properly joined, crimes will be severed only when the defendant proves joinder is prejudicial.

c. Two or more defendants may be charged in the same complaint or information and tried together if they are alleged to have participated in the same act or transactions, provable by the same evidence.

d. Defendants must be severed when the state intends to use a co-defendant's confession, which implicates another defendant to the action.

e. Defendants will be severed when joinder would prejudice a party, such as when defendants offer antagonistic defenses, when a line of evidence offered to implicate one defendant risks the jury imputing the evidence to others because they are tried together, and when a defendant is unable to call a co-defendant as a witness to testify to a prior statement because the witness would invoke the privilege against self-incrimination.

6. Motions in Limine [§ 1.45]

a. These motions, brought to obtain advance rulings on admissibility of evidence, are not recognized by statute but are nonetheless commonly used as additions to defense motion practice. *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386.

b. Suggested procedure for ensuring compliance with in limine orders. *State v. Sigarroa*, 2004 WI App 16, ¶ 30, 269 Wis. 2d 234, 674 N.W.2d 894.

H. Trial [§ 1.46]

1. Jury Procedures [§ 1.47]

a. In general

(1) Generally, civil rules regarding qualifying, selecting, and instructing jury apply to criminal cases. Wis. Stat. § 972.01.

(2) Trial is by 12-person jury, Wis. Stat. § 972.02; *State v. Hansford*, 219 Wis. 2d 226, 241–43, 580 N.W.2d 171 (1998), unless:

(i) Defendant waives;

(ii) State consents (need not justify refusal to consent except in extraordinary circumstances), *State v. Cook*, 141 Wis. 2d 42, 413 N.W.2d 647 (Ct. App. 1987); *and*

(iii) Court approves, *State v. Burks*, 2004 WI App 14, ¶¶ 9–16, 268 Wis. 2d 747, 674 N.W.2d 640.

(3) Challenges to jury array must show departure from law governing jury selection. *Benchbook* CR 23.

b. Voir dire selection of jury. *Turner v. Murray*, 476 U.S. 28 (1986); *Benchbook* CR 23.

(1) Generally done by attorney following introductory questions by court.

(2) May be individualized and outside presence of other jurors if substantial pretrial publicity occurred or sensitive areas will be examined. *State v. Koch*, 144 Wis. 2d 838, 426 N.W.2d 586 (1988).

(3) Effective voir dire depends on well-reasoned questions designed to reveal possible bias. *State v. Delgado*, 223 Wis. 2d 270, 279–80, 588 N.W.2d 1 (1999).

(4) Court must strike for cause any juror who is not indifferent; three types of jury bias: statutory, subjective, and objective. Wis. Stat. § 805.08(1); *State v. Faucher*, 227 Wis. 2d 700, 715–35, 596 N.W.2d 770 (1999).

(5) Each side in felony cases allowed four peremptory challenges unless penalty is life imprisonment, then six each (numbers change in trials with multiple defendants and with additional alternate jurors); three peremptory challenges allowed to each side in misdemeanor cases. Wis. Stat. § 972.03.

(i) May not be exercised to exclude on the basis of race; defendant need not be of the excluded racial group to raise the issue. *Powers v. Ohio*, 499 U.S. 400, 410–15 (1991); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986); *State v. Lopez*, 173 Wis. 2d 724, 728, 496 N.W.2d 617 (Ct. App. 1992).

(ii) May not be exercised to exclude on basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994).

(6) Court may order that additional jurors be selected. Wis. Stat. § 972.04.

(i) Each side allowed one additional peremptory challenge if additional jurors to be selected. Wis. Stat. § 972.03.

(ii) Additional jurors struck by lot before deliberations commence. Wis. Stat. § 972.10(7).

(7) Sequestration of jurors is discretionary in all cases. Wis. Stat. § 972.12.

(8) Court may order anonymous jury following determination that jury needs protection; court must take precautions to minimize risk of prejudice to defendant. *State v. Tucker*, 2003 WI 12, ¶ 27, 259 Wis. 2d 484, 657 N.W.2d 374.

c. Jury views. Wis. Stat. § 972.06; Wis. JI—Crim. 152.

(1) Must be on record.

(2) No communication permitted between parties and jury during view.

2. Jury Instructions [§ 1.48]

a. Defense attorney should always draft instructions to fit specific case.

b. Defense should request theory-of-defense instruction.

c. Defense must preserve objections to jury instructions that court gives or refuses to give. Wis. Stat. § 805.13(3); *State v. Schumacher*, 144 Wis. 2d 388, 397 n.7, 424 N.W.2d 672 (1988).

3. Jury Verdict [§ 1.49]

a. Must be unanimous in criminal trial.

b. May be 5/6 in responsibility phase of trial on plea of not guilty by reason of mental disease or defect. Wis. Stat. § 971.165(2); *State v. Koput*, 142 Wis. 2d 370, 384–85, 418 N.W.2d 804 (1988).

c. Defendant has absolute right to poll the jury, thus requiring individual jurors to state publicly whether they agree with the verdict. *State v. Raye*, 2005 WI 68, ¶¶ 18–20, 281 Wis. 2d 339, 697 N.W.2d 407.

I. Sentencing [§ 1.50]

See Wis. Stat. ch. 973.

1. Counsel's Obligations [§ 1.51]

a. Attorney's obligations continue through sentencing.

b. Defendant and attorney allowed to make statements before sentencing. Wis. Stat. § 972.14(2).

c. If court orders presentence investigation (PSI), attorney should review with defendant. Wis. Stat. § 972.15(2).

(1) Court must disclose PSI to defendant and attorney before sentencing. Wis. Stat. § 972.15(2); *State v. Skaff*, 152 Wis. 2d 48, 56–57, 447 N.W.2d 84 (Ct. App. 1989).

(2) Because PSI is provided to prison staff and may affect inmate's security classification and programming, factual errors should be pointed out to court and corrections sought.

(3) The defendant may prepare and file an alternative sentencing memorandum for the court's consideration.

(4) Although a defendant cannot review and challenge how the Correctional Offender Management Profiling for Alternative Sanctions (commonly known as COMPAS) assessment tool calculates risk, the defendant can review and challenge the resulting risk scores set forth in the COMPAS report attached to the PSI. *State v. Loomis*, 2016 WI 68, ¶¶ 53–56, 371 Wis. 2d 235, 881 N.W.2d 749.

d. Any objection to state's breach of plea agreement must be made at sentencing or is waived. *State v. Merryfield*, 229 Wis. 2d 52, 64–65, 598 N.W.2d 251 (Ct. App. 1999).

2. General Rules [§ 1.52]

a. Sentencing court must explain how sentence imposed serves one or more recognized objectives of sentencing. Wis. Stat. § 973.017; *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

b. Sentencing court must consider the protection of the public, gravity of the offense, rehabilitative needs of the defendant, and aggravating and mitigating factors. Aggravating factors are listed in Wis. Stat. § 973.017.

c. Wisconsin follows a strong policy against interfering with circuit court's sentencing discretion. *Gallion*, 2004 WI 42, ¶ 18, 270 Wis. 2d 535.

d. The rules of evidence, other than Wis. Stat. ch. 905 (privilege) and Wis. Stat. § 901.05 (admissibility of HIV testing), do not apply at sentencing hearings. Wis. Stat. § 911.01(4)(c).

e. Defendant has a due-process right to be sentenced on basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶¶ 9–28, 291 Wis. 2d 179, 717 N.W.2d 1.

f. Defendant is entitled to rebut adverse information at sentencing. *State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997).

g. Any material and substantial breach of plea agreement provides a basis to seek relief, unless cured. *State v. Nietzold*, 2023 WI 22, ¶ 9, 406 Wis. 2d 349, 986 N.W.2d 795; *State v. Williams*, 2002 WI 1, ¶ 5, 249 Wis. 2d 492, 637 N.W.2d 733.

h. Defendant's statements to author of court-ordered PSI are inadmissible at a later trial, but statements to author of defense PSI are admissible. *State v. Greve*, 2004 WI 69, ¶ 2, 272 Wis. 2d 444, 681 N.W.2d 479.

3. Credit for Time Served [§ 1.53]

See Wis. Stat. § 973.155.

a. Attorney should request credit for time served, even when defendant is being placed on probation.

b. A convicted offender should be given credit toward the service of the sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.

c. Proper handling of this matter avoids unnecessary postconviction proceedings.

4. Stay of Execution [§ 1.54]

See Wis. Stat. § 973.15(8).

a. In most cases, sentencing court may stay execution of sentence of imprisonment.

b. Stay must be for one of the following reasons:

  (1) For legal cause (includes appeal), Wis. Stat. § 973.15(8)(a)1.; *State v. Szulczewski*, 216 Wis. 2d 495, 505–07, 574 N.W.2d 660 (1998); *Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881);

  (2) Under Wis. Stat. § 973.09(1)(a) (probation); or

  (3) For not more than 60 days.

J. Postconviction Motions/Appeals [§ 1.55]

See *Benchbook* CR 38–42.

1. Attorney's Obligations [§ 1.56]

See Whitmore v. State, 56 Wis. 2d 706, 717–20, 203 N.W.2d 56 (1973).

a. Trial attorney's obligations continue until defendant decides whether to seek postconviction relief.

b. Trial attorney has duty to assist defendant in making decision.

2. Notice of Intent to Pursue Postconviction Relief [§ 1.57]

See Wis. Stat. § 809.30(2).

a. Appellate process initiated by filing notice in circuit court within 20 days after sentencing.

b. Notice goes to circuit court and district attorney.

c. Notice must include the following:

(1) Case name and number;

(2) Judgment or order from which defendant will seek postconviction relief and date granted or entered;

(3) Name and address of defendant and attorney; and

(4) Information regarding representation by appointed or retained attorney, both at trial level and for postconviction proceedings.

3. Motion to Modify Sentence [§ 1.58]

See Wis. Stat. §§ 809.30(2), 973.19.

a. Must be considered as part of postconviction process.

b. Timing differs if trial transcripts ordered.

4. Postconviction and Appeal Statutory Procedures [§ 1.59]

See Wis. Stat. § 809.30.

a. Procedures governing timing for ordering transcripts, filing motions, etc., set forth in statutes.

b. Bail on appeal or postconviction motion governed by statutes. Wis. Stat. §§ 809.31, 969.01(2).

c. Cash bond may be imposed on an indigent person pending appeal of a misdemeanor, if risk exists that person may fail to appear. *State v. Taylor*, 205 Wis. 2d 664, 666, 556 N.W.2d 779 (Ct. App. 1996).

d. Stay of execution of sentence may be granted by court either for appeal or for period up to 60 days (court's discretion limited in certain operating while intoxicated (OWI) cases). Wis. Stat. § 973.15(8).

5. Postconviction Modification of Bifurcated Sentences [§ 1.60]

a. Eligibility for earned release program (referred to in statutes as "Wisconsin substance abuse program"), challenge incarceration program. Wis. Stat. §§ 302.045, 302.05, 302.113(1), (2), 973.01(3g), (3m); *infra* ch. 8.

b. Sentence adjustment. Wis. Stat. §§ 302.113(2), 973.195(1r); *infra* ch. 8.

(1) Applicable to inmates who have served 85% of their term of confinement for Class C–E felonies or 75% of their term of confinement for Class F–I felonies.

(2) Acquired right for inmates who earned positive adjustment time between October 1, 2009, and August 3, 2011. Wis. Stat. § 973.198; *see also* Wis. Stat. §§ 302.113(1), (2) (2007–08), 304.06(1)(bg) (2007–08) (as affected by 2009 Wis. Act 28).

c. Release to extended supervision for extraordinary health condition (may be based on age, infirmity, disability, or need for medical treatment not available within correctional institution). Wis. Stat. § 302.113(1), (2), (9g); *infra* ch. 8.

d. Risk-reduction sentence: Applicable only to inmates who successfully complete a risk-reduction sentence imposed between October 1, 2009 and August 3, 2011. Wis. Stat. § 302.043; *see also* Wis. Stat. §§ 302.042(4) (2007–08), 973.031 (2007–08) (as affected by 2009 Wis. Act 28); *infra* ch. 8.

e. Petition to modify court-ordered conditions of extended supervision. Wis. Stat. § 302.113(7m).

f. Petition for release from life sentence to extended supervision. Wis. Stat. § 302.114(1)–(6).

III. Checklist of Time Limitations (CRM-0001) [§ 1.61]

Checklist of Time Limitations [1]

Event	Wis. Stat. §	Forms	When Event Must Occur
Prosecution for offense (statute of limitation)	939.74(1)	5.34A	• Most felonies: Within 6 years
	939.74(2)(a), (am), (ar)		• Homicide and specified sexual assaults: No time limitation [2]/within 15 years [3]/within 10 years [4]
	939.74(1)		• Misdemeanor or adultery: Within 3 years
	939.74(2)(b)		• Theft (misappropriation): May be commenced within 1 year after discovery of loss, but no more than 5 years after time limitation in Wis. Stat. § 939.74(1)
	939.74(2)(c)		• Specified sexual assaults against a child, including repeated sexual assaults on same child; or intentional causation of “great bodily harm” to a child: Before victim is 45 [5]
	939.74(2)(cm)		• Causation of, or failure to prevent, bodily or mental harm to a child; or child enticement for purpose of causing bodily or mental harm to child or giving or selling controlled substance to child: Before victim is 26
	939.74(2)(c)		• Child trafficking: Before the victim reaches the age of 45
	939.74(4)		• Sexual exploitation by therapist: Limit extended by time that alleged victim is unable to seek criminal complaint because of actions of therapist
	939.74(2d)		• DNA extension: If DNA collected before limitation period expires, prosecution may begin in certain sexual assault and child abuse cases within 1 year after DNA match is discovered (or at any time in cases brought under Wis. Stat. §§ 940.225(1), 948.02(1))
Execution of search warrant	968.15(1)	5.45A–5.45D	Not more than 5 days after issuance
Return of search warrant	968.17(1)	5.45A–5.45D	Within 48 hours after execution of warrant, together with inventory of property taken

Event	Wis. Stat. §	Forms	When Event Must Occur
Filing of affidavit or complaint made in support of warrant	968.17(2)	5.45A–5.45D	Within 5 days after execution of warrant
Notification of right to counsel	967.06		As soon as practicable after person is detained or arrested
Application for indigency determination	967.06	10.25A–10.25F	Immediately after person's statement of wish to be represented and inability to pay
Motion for modification of bail	969.08(3)	5.50A	On reasonable notice
Notice of change of address of person released on bail or other conditions	969.10		Within 48 hours after change
Issuance of complaint	968.02	5.34A	Before statute of limitation has run, *see* Wis. Stat. § 939.74
Initial appearance	970.01	5.22A	Within reasonable time after arrest [6]
Objection to jurisdiction	970.01	5.23A–5.26B	Before or at initial appearance [7]
Motion to dismiss complaint	971.31(5)(c) 971.31(5)(a)	5.23A	Felony: Before preliminary examination (or is deemed waived) [8] Misdemeanor: No later than 10 days after initial appearance
Preliminary examination	970.03(2)	5.30A, 5.30B	• If defendant in custody with bail exceeding $500: Within 10 days after initial appearance • If defendant not in custody: Within 20 days after initial appearance
Filing of information	971.01(2)	5.31A, 5.31B	Within 30 days after preliminary examination, unless time extended for cause
Request for substitution of judge	971.20	5.20A	• Judge assigned to preliminary examination: At least 5 days before preliminary examination, unless court otherwise permits • Trial judge originally assigned: Before making any motions to circuit court and before arraignment • Trial judge subsequently assigned: -Generally: Within 15 days after notice of assignment -If notice given within 20 days before trial: Within 48 hours after notice -If no notice or notice given within 48 hours before trial: Oral or written request may be made before trial begins
Motion to transfer jurisdiction to juvenile court	938.183(1m), 970.032(1), (2), 970.035		Before arraignment [9]

Event	Wis. Stat. §	Forms	When Event Must Occur
Amendment of complaint, indictment, or information	971.29(1)		• Before trial: Any time before arraignment, without leave of court • At trial: If not prejudicial to defendant
Arraignment	971.05		No specified time limitation [10]
Entry of plea	971.05(3), (4)		At arraignment unless pretrial motion filed that must be determined before entry of plea
Motion for change of trial location	971.22(1)	5.53A, 5.53B	At arraignment, unless time extended for cause
Pretrial motions	971.31(5)(a)	5.17A–5.53B	Unless court otherwise permits: • Misdemeanor: Within 10 days after initial appearance • Felony: Within 10 days after arraignment
Discovery of defendant's statements and names of witnesses thereto [11]	971.23(1)(a), (b)	5.36A, 5.36B	On demand and within reasonable time before trial
Discovery of defendant's criminal record	971.23(1)(c)	5.36A, 5.36B	On demand and within reasonable time before trial, if within state's possession
Discovery of witness lists	971.23(1)(d), (2m)(a)	5.36A, 5.36B, 5.40A	On demand and within reasonable time before trial
Disclosure of witnesses' criminal records	971.23(1)(f), (2m)(b)	5.36A, 5.36B	On demand and within reasonable time before trial
Disclosure of witnesses' statements	971.23(1)(e), (2m)(am)	5.36A, 5.36B	On demand and within reasonable time before trial
DNA evidence	971.23(9)		Notice of intent to use DNA evidence at least 45 days before trial, regardless of discovery demand; information required by Wis. Stat. § 971.23(1)(e) or (2m)(am) within 15 days after request
Protective order	971.23(6)		No specified time limit [12]
Inspection of physical evidence	971.23(1)(g), (2m)(c), 971.31(5)	5.36A, 5.36B	On demand and within reasonable time before trial
Motion for scientific testing	971.23(5), 971.31(5)	5.39A, 5.39B	Unless court otherwise permits: • Misdemeanor: Within 10 days after initial appearance • Felony: Within 10 days after arraignment
Notice of intent to introduce learned treatise	908.03(18)(a)		At least 40 days before trial

Event	Wis. Stat. §	Forms	When Event Must Occur
Notice of intent to introduce rebutting learned treatise	908.03(18)(b)		No later than 20 days after service of original notice under Wis. Stat. § 908.03(18)(a)
Service of notice of availability of certified, accurate, legible, and complete copies of hospital records	908.03(6m)(b)		At least 40 days before trial or hearing
Notice of intent to introduce videotaped statements of children	908.08(2)(a), 971.23(1)(e)	5.36A, 5.36B	Not less than 10 days before trial or hearing, or at such later time as court or hearing examiner permits upon cause shown
Initiation of competency proceedings	971.14(1r)		Whenever reason to doubt defendant's competency arises
Completion of competency examination	971.14(2)(c)		• Inpatient: Within 15 days after examination ordered or as specified in Wis. Stat. § 971.14(2)(am)[13] • Outpatient: Within 30 days after examination ordered
Reexamination of competency	971.14(5)(b)		3, 6, and 9 months after commitment and within 30 days before expiration of commitment
Appointment of physicians to examine defendant's mental responsibility	971.16		Whenever defendant has entered plea of not guilty by reason of mental disease or defect or there is reason to believe defendant's mental responsibility will become issue in case[14]
Filing of physicians' reports on examination of defendant's mental responsibility	971.16(3)		Not less than 10 days before trial or at such other time as court directs
Transmittal of expert witnesses' reports on defendant's mental responsibility	971.16(4)		• Defense reports to DA: Not less than 15 days before trial[15] • State's reports to defense: Not less than 15 days before trial
Use of alibi as defense	971.23(8)	5.42A	• Notice by defense: At arraignment or at least 30 days before trial • State's response (list of rebuttal witnesses): Within 20 days after receipt of notice, or at such other time as court orders

Event	**Wis. Stat. §**	**Forms**	**When Event Must Occur**
Trial	971.10	5.52A	• Misdemeanor: Within 60 days after initial appearance • Felony: Within 90 days after date trial demanded [16]
Motion to transfer jurisdiction to juvenile court	938.183(1m), 971.31(13)		Before sentencing (applicable when conviction is for a lesser offense or joined offense)
Notice of intent to pursue postconviction relief [17]	808.04(3), 809.30(2)(b)	9.47A, 9.47B	Within 20 days after sentencing
Motion to modify sentence	973.19(1), 809.30(2)(h)	9.50A	• If no transcripts requested: Within 90 days after sentencing, or later if a "new factor" is discovered [18] • If transcripts requested: Within 60 days after service of transcript
Petition for sentence adjustment (bifurcated sentence)	973.195	9.50A	When defendant has served either 75% or 85% of term of confinement, depending on felony classifications of offense (applicable to certain sentences imposed before October 1, 2009, or after August 3, 2011)
Petition to modify bifurcated sentence because of extraordinary health condition	302.113(9g)	9.50A	When defendant (1) has attained age 65 and served 5 years of confinement, (2) has attained age 60 and served 10 years of confinement, or (3) has an extraordinary health condition (petition is submitted to program review committee at correctional institution at which the inmate is confined)
Petition to modify court-imposed conditions of extended supervision	302.113(7m)(e)	9.52A	• If inmate is serving confinement portion of bifurcated sentence: no earlier than one year before inmate's date of release to extended supervision • If inmate is serving extended supervision portion of sentence: no earlier than one year after inmate is released to extended supervision
Petition for release to extended supervision for felony offenders serving life sentences [19]	302.114(2), (5)		After defendant has served 20 years or after defendant has reached the extended supervision eligibility date set by the court (applicable to offenses that occurred after December 30, 1999) (may file petition no earlier than 90 days before eligibility date)

IV. Checklist for the Initial Appearance (CRM-0002) [§ 1.62]

A. Before the Initial Appearance

☐ Locate and contact the client.

☐ Obtain the services of a qualified interpreter, if needed.

☐ Set the fee (if retained) and state clearly what retainer or appointment covers.

☐ Interview the client. *See infra* ch. 3.

☐ Determine whether the client is a U.S. citizen, and if not a citizen, the client's legal status.

☐ Advise the client as follows:

- Refuse to talk about the case with anyone except attorney and attorney's colleagues (e.g., investigator, paralegal).
- Refuse to answer any questions asked by the police, or anyone else, about the present charges or any other charges or alleged crimes. *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *infra* Form 3.113A.
- Refuse to give the police any consents or waivers.
- Refuse to submit to any lineups, identifications, examinations, or tests without prior consultation with counsel and without counsel's presence and advice.
- Be polite to everyone.
- Invoke Wis. Stat. § 946.75 (relating to denial of right to counsel).

☐ Contact the prosecutor or law enforcement officers in charge of the case.

- Verify the charges.
- Ask for the police version of the offense and arrest.
- Obtain the names of all witnesses.
- Ask if there are plans to move the client, exhibit the client for identification, etc.
- Ask for the arresting officer's name and how the officer can be contacted.
- Insist that no one question the client concerning the instant offense, or any other offense, unless you are present. *Montejo v. Louisiana*, 556 U.S. 778, 792–97 (2009); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Delebreau*, 2015 WI 55, 362 Wis. 2d 542, 864 N.W.2d 852 (defendant's waiver of *Miranda* rights is sufficient to waive Sixth Amendment right to counsel;

Wisconsin Constitution does not provide greater protection than Sixth Amendment in this context).

- Insist that no one request any consents or waivers from the client.
- Insist that the client not be exhibited for identification.
- Insist that no tests or examinations be conducted on the client, absent a court order.
- Follow up with a letter to law enforcement and prosecutor, documenting client's invocation of right to counsel and right to remain silent.

☐ Contact the client's family, with the client's consent.

☐ Review the elements of the alleged offense.

☐ Accompany and represent the client at any identification confrontations or testing procedures. *Gilbert v. California*, 388 U.S. 263 (1967).

☐ If client is incarcerated, negotiate conditions of release or prepare to argue for reasonable conditions. Wis. Stat. §§ 969.01, 970.01.

☐ Begin the investigation; be familiar with mandates relating to effective assistance of counsel. SCR 20:1.1–20:1.4; *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Harper*, 57 Wis. 2d 543, 553–54, 205 N.W.2d 1 (1973).

- Locate witnesses and objects that may be lost if a search is delayed.
- Hire an investigator and a photographer, if necessary (advance approval from appointing authority may be required for reimbursement of expenses).
- Interview (or arrange for investigator to interview) witnesses and others:
  - Police
  - Complainant
  - Victim
  - Other witnesses
  - Co-defendants (with permission of their attorneys, if they are represented). SCR 20:4.2.
  - Client's family
  - Bail resources

☐ Visit the scene.

☐ Consider sources of information, such as newspapers, records, social-networking sites, weather reports, and journalists.

☐ Consider psychiatric examination of the client (advance approval from appointing authority may be required for reimbursement). Wis. Stat. §§ 971.13, 971.14, 971.16.

☐ Maintain contacts with the police and prosecutor, with an eye toward obtaining a dismissal or reduction of the charges or a reduction in the amount of bail.

☐ Consider and discuss with the client the preliminary-examination time limits or waiver of those limits. Wis. Stat. § 970.03(2).

☐ Help the client improve the client's image by obtaining employment or entering treatment, counseling, or a church program.

☐ Discuss with the client the stages in the criminal process and what to expect.

☐ Give the client an honest evaluation of the case based on your experience and expertise.

☐ Per *Jones v. Barnes*, 463 U.S. 745, 751 (1983), advise the client that the client is in control of the litigation and has the sole right to make the ultimate decisions about the following:

- Whether to plead guilty, not guilty, or no contest
- If the decision is to plead not guilty, whether to try the case to a jury or to the court
- Whether to testify at the trial
- Whether to appeal from the circuit court's judgment

☐ Assure the client that you will keep the client informed of the technical and tactical decisions that need to be made during the case (but emphasize, if necessary, that you are ultimately responsible for making those decisions).

B. At the Initial Appearance

☐ On the record, state that the appearance is a special appearance, with reservation of all rights to make jurisdictional and other objections. *State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975).

☐ If a client is of limited English proficiency, request that a qualified interpreter be appointed to interpret all court proceedings. Wis. Stat. §§ 885.38, 967.09.

☐ Obtain a copy of the complaint. Wis. Stat. § 970.02(1)(a).

☐ Be prepared with bail arguments and evidence, if necessary. Wis. Stat. § 969.01(4).

- ☐ In a misdemeanor case, consider and discuss with the client the right to substitution of judge; if the client requests a substitution, file substitution form before making any motions and before arraignment. Wis. Stat. § 971.20.

- ☐ Consider an oral motion to dismiss the complaint. Wis. Stat. § 971.31(2).

- ☐ In a felony case, request or waive a preliminary examination. Wis. Stat. § 970.02(4), (5).

C. After the Initial Appearance

- ☐ Continue the investigation.

- ☐ Advise the client of the next stage of the criminal process and what it involves.

- ☐ Draft and file a discovery demand. Wis. Stat. § 971.23.

- ☐ In a misdemeanor case, file motions within 10 days after the initial appearance. Wis. Stat. § 971.31(5)(a).

- ☐ In a felony case, file any motion to dismiss the complaint before the preliminary examination or waiver of the preliminary examination. Wis. Stat. § 971.31(2), (5)(c), (6).

- ☐ In a felony case, consider the appropriateness and tactics of filing or not filing all other motions before the preliminary examination. Wis. Stat. § 971.31(5), (6).

- ☐ In a felony case, consider a review of bail before the preliminary examination. Wis. Stat. § 969.08.

- ☐ Consider the possibility of obtaining a review of bail decision by habeas corpus. *State ex rel. Wohlfahrt v. Bodette*, 95 Wis. 2d 130, 289 N.W.2d 366 (Ct. App. 1980).

- ☐ In a felony case, consider the preliminary-examination time limits and the pros and cons of waiving the preliminary examination. *See* Wis. Stat. § 970.03(2). Factors to consider include the following:

  - The opportunity to obtain discovery at the preliminary examination

  - The opportunity to pin down or create inconsistencies in witnesses' testimony

  - The opportunity to better assess the state's case

  - The possibility that a witness who may later be unavailable may give testimony at the preliminary examination that could be used against the defendant at trial

  - The strength of the case against the defendant

  - The possibility of adverse publicity

  - The possibility that a defect in the state's case may be discovered at the preliminary examination and corrected

- The possibility that the prosecution may file a greater charge or additional charges following the preliminary examination

  Practice Tip. A preliminary examination generally should *not* be waived absent compelling reasons.

❑ Consider a motion for examination of the defendant's competency to proceed. Wis. Stat. § 971.14.

V. Checklist for the Preliminary Examination (CRM-0003) [§ 1.63]

A. Before the Preliminary Examination

☐ Consider filing a motion for substitution of the judge assigned to preside over the preliminary examination. Wis. Stat. § 971.20(3).

☐ Consider the pros and cons of calling defense witnesses at the preliminary examination. Wis. Stat. § 970.03(5).

Practice Tip. Because the court does not weigh the credibility of conflicting versions of events, the defense rarely calls witnesses at the preliminary examination.

☐ Research lesser-included offenses to support argument, at the close of the preliminary examination, that only a misdemeanor has been proven. Wis. Stat. § 970.03(8).

☐ Research the elements of the offense(s) for possible motions on the complaint or motions to dismiss at the close of evidence at the preliminary examination. Wis. Stat. § 970.03(9), (10).

☐ If the client is joined with other defendants, consider filing a motion to sever for the preliminary examination. Wis. Stat. § 971.12(3).

☐ If multiple counts are alleged and are not transactionally related, consider filing a motion to sever counts for the preliminary examination. Wis. Stat. § 971.12.

B. At the Preliminary Examination

☐ On the record, state that the appearance is a special appearance with reservation of all rights to jurisdictional and other objections. *State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975).

☐ If client is incarcerated and eligible for release, obtain a review of conditions of release.

☐ Move to exclude witnesses and have them kept separate, or instructed not to communicate with one another, until the hearing is ended. Wis. Stat. §§ 906.15, 970.03(6).

☐ Consider filing a motion for a closed hearing if the client is accused of (1) sexual assault; (2) sexual, physical, or mental abuse of a child; or (3) a crime against chastity, morality, or decency. Wis. Stat. § 970.03(4).

☐ If the preliminary examination has not been timely held and if the time limits have not been waived, move to dismiss for lack of personal jurisdiction. *Armstrong v. State*, 55 Wis. 2d 282, 198 N.W.2d 357 (1972).

☐ Cross-examine witnesses to attack the plausibility of their testimony. Be aware of distinction between plausibility and credibility. *State ex rel. Funmaker v. Klamm*, 106 Wis. 2d 624, 630–31, 317 N.W.2d 458 (1982).

☐ Make sure the record shows that full cross-examination has not been permitted; otherwise, the transcript from the preliminary examination may be admissible at trial. *State v. Stuart*, 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259; *Nabbefeld v. State*, 83 Wis. 2d 515, 266 N.W.2d 292 (1978).

☐ If the client is joined with a co-defendant whose statement is to be used, move for limited admissibility. Wis. Stat. § 901.06.

☐ At the close of the evidence, move to dismiss the charges, object to a bindover, or both. Wis. Stat. § 970.03(9).

C. After the Preliminary Examination

☐ Consider requesting a transcript of the preliminary examination. Wis. Stat. § 970.05.

☐ Continue the investigation, with particular attention to any new information discovered at the preliminary examination.

☐ Consider (1) a motion to dismiss the proceedings because of the insufficiency of the evidence at the preliminary examination, (2) a review by interlocutory appeal, or (3) review by habeas corpus. *State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991); *State ex rel. Hanna v. Blessinger*, 52 Wis. 2d 448, 190 N.W.2d 199 (1971); *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 369 N.W.2d 743 (Ct. App. 1985).

☐ If applicable, move for transfer of jurisdiction from adult to juvenile court. Wis. Stat. §§ 938.183(1m), 970.032(1), (2), 970.035.

☐ Discuss with the client the case presented by the prosecution at the preliminary examination.

☐ Discuss with the client the advantages and disadvantages of demanding a speedy resolution of the case.

☐ Discuss substitution of judge, if not requested before preliminary hearing.

☐ File or renew jurisdictional motions. Be sure all jurisdictional motions are made before, or at least contemporaneously with, other motions.

VI. Checklist for Plea Negotiations and the Plea Decision (CRM-0004) [§ 1.64]

A. Attorney's Responsibilities Before Entering into Negotiations

☐ Investigate the facts of the case thoroughly. *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Harper*, 57 Wis. 2d 543, 553–54, 205 N.W.2d 1 (1973).

☐ Analyze the facts and law in the case, including potential maximum penalties, applicable sentencing guidelines, and statutory aggravating factors. Wis. Stat. § 973.017; *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983); *infra* ch. 4.

☐ Explain your assessment of the case, the available alternatives, and the consequences of conviction to the client. *See* Matters to Discuss with the Client, *infra*.

☐ Know your client's citizenship or legal status. Know which conviction(s) will definitely result in deportation, which conviction(s) may result in deportation, and which conviction(s) will result in the client's future inadmissibility to the United States or significantly affect the client's ability to demonstrate good moral character in future admission or citizenship applications. 8 U.S.C. § 1182; 8 U.S.C. § 1227; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895, *partially abrogated by State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 (withdrawing only that language in *Mendez* that suggests *Padilla* requires attorney to advise that conviction for deportable offense will necessarily result in deportation; *Padilla* satisfied by correctly advising that guilty plea carried "strong chance" of deportation; recognizing deportation is not an absolute certainty because executive action can block deportation of deportable aliens).

Note. Criminal defense attorneys have an affirmative duty under the Sixth Amendment to investigate and discuss potential immigration consequences with a client; a warning that deportation "could" or "probably would" result in deportation is insufficient advice in cases resulting in mandatory, certain, or automatic deportation.

Note. A rational decision to plead not guilty is not limited to whether a noncitizen defendant would likely prevail at trial, because a noncitizen may be more concerned with deportation then the length of a term of confinement. *Mendez*, 2014 WI App 57, ¶¶ 11–12, 16, 354 Wis. 2d 88, *partially abrogated by State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 (executive action can block deportation, thus deportation is not an "absolute certainty"; advising client that guilty plea carried "strong chance" of deportation is sufficient).

Practice Tip. Deportation is mandatory if person is convicted of an "aggravated felony." A list of aggravated felonies are listed in 8 U.S.C. § 1101(a)(43) and the Immigration and Nationality Act § 101(a)(43).

Practice Tip. Defense attorneys should seek the advice of an immigration attorney or the State Public Defender Immigration Practice Group if they are unable to independently analyze immigration consequences in a particular case.

☐ Obtain the client's authorization to enter into negotiations.

B. Matters to Discuss with the Client

☐ Discuss the case with the client, including the following:

- The elements of the crime(s) to which the client may plead and the law in relation to the facts. *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).
- The strengths and weaknesses of the defense case

☐ Discuss with the client the pleas that may be entered, per Wis. Stat. § 971.06:

- Guilty
- Not guilty
- No contest (subject to court approval)
- Not guilty by reason of mental disease or defect (may be, and usually should be, joined with a plea of not guilty)

☐ Advise the client that if the client "stands mute" or refuses to plead at the arraignment, the court will enter a plea of not guilty. Wis. Stat. § 971.06(2).

☐ Discuss the alternatives to pleading guilty or no contest with the client, including the following:

- Trying the case
- Filing pretrial motions

Practice Tip. The defense attorney should discuss (1) the advantages and disadvantages of filing pretrial motions, (2) the advantages and disadvantages of having the court make a decision on the motions before the client enters a plea of guilty or no contest, and (3) the availability of review of adverse rulings after a plea of guilty or no contest. *See* Wis. Stat. § 971.31(10) (order denying motion to suppress evidence or statement of defendant is reviewable on appeal after defendant pleads guilty).

☐ Explain the right to trial to the client.

☐ Explore any settlement offers with the client.

☐ Advise the client of all possible consequences of conviction, including:

- If the client is not a citizen, the potential for deportation or other adverse consequences 8 U.S.C. § 1182; 8 U.S.C. § 1227; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895, *partially abrogated by State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93.
- The maximum penalties authorized by law:

  - Jail or prison time, *see infra* §§ 8.6–.8 (Quick Reference Guide to Sentencing). Wis. Stat. §§ 939.50, 939.51, 939.61.
  - Fines, *see infra* § 8.41 (Quick Reference Guide to Sentencing). Wis. Stat. § 973.05.
  - Costs, fees, and surcharges; see §§ 8.42–.46 (Quick Reference Guide to Sentencing), *infra*, for descriptions of commonly imposed surcharges. Wis. Stat. §§ 973.06, 973.07, 814.75, 814.76.
  - Restitution, *see infra* §§ 8.47–.56 (Quick Reference Guide to Sentencing). Wis. Stat. §§ 973.09(1)(b), 973.20.
  - Community service, *see infra* § 8.59 (Quick Reference Guide to Sentencing). Wis. Stat. §§ 973.03(3), 973.05(3), 973.09(7m).
  - Costs assessed by county or Department of Corrections. Wis. Stat. §§ 302.372, 302.381, 304.074(2).
- The possibility of enhanced sentences for any of the following:
  - Habitual criminality. Wis. Stat. § 939.62.
  - Habitual-traffic-offender status. Wis. Stat. § 351.08.
  - Certain domestic-abuse offenses. Wis. Stat. § 939.621.
  - Increased penalty for elder person (60 years old or older) victims. Wis. Stat. § 939.623.
  - Commission of a crime while possessing, using, or threatening to use a dangerous weapon. Wis. Stat. § 939.63.
  - Violent crime in a school zone. Wis. Stat. § 939.632.
  - Certain crimes against a child for whom the defendant was providing paid child care. Wis. Stat. § 939.635.
  - Commission of a crime against certain people or property selected because of the victim’s or owner’s race, religion, color, disability, sexual orientation, national origin, or ancestry. Wis. Stat. § 939.645.
  - Delivery of certain controlled substances to a person age 17 or younger (applies if child is at least three years younger than offender). Wis. Stat. § 961.46.
  - Felony drug offense as second or subsequent drug conviction (first offense may be either felony or misdemeanor). Wis. Stat. § 961.48.
  - Felony drug offense near school or other specified location. Wis. Stat. § 961.49.

- Per *Edelman v. State*, 62 Wis. 2d 613, 215 N.W.2d 386 (1974), mandatory minimum penalties for the following:
    - Repeat firearm crimes: mandatory minimum term of prison confinement of four years. Wis. Stat. § 939.6195.
    - Third conviction for specified serious felony (persistent repeater under "three strikes" law): mandatory life sentence without eligibility for release. Wis. Stat. § 939.62(2m)(a)2m., (b)1., (c).
    - Second conviction for serious child sex offense (persistent repeater under "two strikes" law): mandatory life sentence without eligibility for release. Wis. Stat. § 939.62(2m)(a)1m., (b)2., (c).
    - Second conviction for serious sex crimes: mandatory minimum term of prison confinement of three years and six months; maximum sentence of life (without eligibility for release) for second violation of Wis. Stat. § 940.225(1). Wis. Stat. § 939.618.
    - Certain sexual offenses against children: (1) mandatory minimum term of prison confinement of 25 years or 5 years, depending on specific provision of Wis. Stat. § 948.02 or 948.025, Wis. Stat. § 939.616; (2) mandatory minimum term of prison confinement of 5 years or 3 years, depending on specific provision of Wis. Stat. § 948.05, 948.075, 948.12, or 948.13, although court can impose a lesser sentence if specified conditions are met, Wis. Stat. § 939.617.
    - Second conviction for serious violent crimes: mandatory minimum term of prison confinement of five years. Wis. Stat. § 939.619.
    - Life terms: Persons sentenced to a life term may be eligible for release on extended supervision after serving 20 years or more, as determined by the court at the time of sentencing. The court may, however, deny eligibility for release. Also, persons sentenced under the persistent-repeater law ("three strikes" or "two strikes") are not eligible for release on extended supervision. Wis. Stat. §§ 302.114, 939.62(2m)(c), 973.014(1g).
    - Graduated penalties and guidelines for certain traffic crimes: Mandatory elements of criminal OWI sentence generally include jail or prison time, fine, revocation of operating privileges, ignition interlock device requirement, and driver-improvement surcharge, depending on number of prior suspensions, revocations, and convictions. Wis. Stat. §§ 343.05 (OWL), 343.30, 343.44 (OAR/OAS), 346.63 (OWI), 346.65 (OWI).

      Practice Tip. Jail or prison sentences for OWI third offenses and higher must commence immediately. Wis. Stat. § 973.15(8)(a)3.
    - Conviction of controlled substance offense may result in suspension of driving privileges. Wis. Stat. § 961.50.
- Extended supervision for felony offenders sentenced to prison: Bifurcated sentence structure includes a period of extended supervision of at least 25% of the term of confinement. Wis. Stat. §§ 302.113, 973.01(2)(d).

- Any credit due under the sentence-credit laws. Wis. Stat. §§ 973.04, 973.155.
- The likely place of imprisonment (if incarceration is a possibility). Wis. Stat. § 973.02.
- Probation (explanation must include maximum probation periods that may be imposed, general rules of probation, the reasons for which probation can be revoked, and the general procedures applicable for a proceeding to revoke probation).
- If the client is on supervision, the possibility that a new conviction may precipitate revocation proceedings.
- Wis. Stat. ch. 980 (offenders convicted of a “sexually violent offense,” Wis. Stat. § 980.01(6), may be committed indefinitely under the sexual-predator law).
- DNA sample (required of certain offenders) and surcharge (required of all offenders convicted after December 31, 2013). Wis. Stat. §§ 973.047, 973.046.
- Sex-offender registration required of certain offenders; public access to information concerning sex offenders; criminal penalties for failure to register or update information; criminal penalties for failure to notify schools. 34 U.S.C. §§ 20911–20932 (Adam Walsh Child Safety and Protection Act, federal registry); 18 U.S.C. § 2250 (penalties for noncompliance); Wis. Stat. §§ 301.45, 301.46, 301.475.
- Civil disabilities imposed by state or federal law:
  - Loss of, or ineligibility for, certain occupational licenses (attorney should check the applicable Wisconsin Administrative Code sections for the licensing board or contact the appropriate board directly). Wis. Stat. chs. 440–480; SCR 20:8.4, 21.16 (lawyers).
  - Restrictions on sex offenders working with children. Wis. Stat. § 948.13.
  - Loss of the right to vote until sentence is completed. Wis. Stat. §§ 6.03(1)(b), 304.078.
  - Loss of the right to possess a firearm (felony conviction). Wis. Stat. §§ 938.341 (delinquency adjudication), 941.29, 973.176.
  - Prohibition of firearm possession resulting from conviction of felony or other specific offense. 18 U.S.C. § 922(g).
  - Possible driver’s license and fish-and-game license restrictions. Wis. Stat. ch. 29; Wis. Stat. §§ 343.06, 343.25–.325, 938.34(8) (delinquency adjudication), 938.342–.344, 938.345.
- Liabilities or restrictions under federal statutes or regulations include the following:
  - Possible unacceptability for military service, public office, or employment.
  - Loss of eligibility for student loans (consequence of certain controlled-substance convictions). 20 U.S.C. § 1091(r)(1).

- Privately imposed sanctions, discrimination, or other adverse consequences, such as the following:
    - Adverse effect on employment.
    - Higher insurance rates or the refusal to insure.
    - Public access to court records and computerized records, *see infra* § 8.33 (Quick Reference Guide to Sentencing). Wis. Stat. §§ 19.35(1), 758.19(4).
- Possible forfeiture or destruction of property connected with the crime to which the client is pleading. Wis. Stat. §§ 342.30(4), 968.20(1m)(b), 973.075–.077.
- Installation of ignition-interlock device. Wis. Stat. §§ 343.301, 940.09(1d), 940.25(1d).

Practice Tip. A defendant whose household income is at or below 150 percent of the federal poverty line is entitled to a court order providing that the defendant pay only one-half of the cost of equipping and maintaining ignition-interlock devices. Wis. Stat. § 343.301(3).

C. Defense Strategies for the Negotiations

☐ Be prepared to try the case, if negotiations fail.

☐ Avoid publicity.

☐ Set goals for the negotiations.

☐ Make sure you have the client’s authorization to negotiate.

☐ Be clear on the client’s bottom line.

☐ Check the court calendar and investigate the prosecutor’s priorities.

☐ Try to discover the prosecutor’s bottom line.

☐ Strive to persuade other concerned parties (e.g., police officers, the victim, the probation officer, the judge, the complainant, or anyone else with a stake in the outcome) to agree with your proposed disposition.

☐ Ask for more than you expect the prosecution to concede.

☐ Concede nothing of substance unless the prosecution concedes something in return.

☐ Consider what offers the client would be willing to accept in exchange for a guilty or no contest plea, such as the following:

- Charge reduction

- “Read-in.” *State v. Lackershire*, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835; *State v. Floyd*, 2000 WI 14, ¶ 25, 232 Wis. 2d 767, 606 N.W.2d 155 (same).
- Charge dismissal
- Promise not to bring additional charges
- Sentence recommendation
- Place and nature of confinement
- Special disposition, such as the following:
    - Expungement of record. Wis. Stat. § 973.015.

      Available to a defendant who is under the age of 25 at the time of the commission of the offense and is found guilty of a misdemeanor or first Class I or Class H felony; but see Wis. Stat. § 973.015(1m)(a)2. (for certain invasion-of-privacy offenses, expungement available only if the person was under the age of 18 when the offense was committed).
    - Conditional discharge. Wis. Stat. § 961.47.

      Available to first-time possession-of-controlled-substance offenders.
    - Reverse waiver. Wis. Stat. § 938.183(1m).
- Deferred prosecution or diversion program: Some counties have specialized programs, such as drug treatment courts, first-offender diversion, or victim-offender conferencing, that may lower the client’s risk of committing future offenses and may result in diversion, reduction of charges, or reduction of penalty. Wis. Stat. §§ 971.37–.41.
- Deferred adjudication. *State v. Wollenberg*, 2004 WI App 20, ¶¶ 16–21, 268 Wis. 2d 810, 674 N.W.2d 916.
- Community service. Wis. Stat. §§ 973.03(3), 973.05(3), 973.09(7m).
- “Hold open”
- Reduction of charge to city or county ordinance violation
- Electronic monitoring

❑ Consider what the client would be willing to offer in exchange, such as the following:

- Agreement to plead guilty or no contest
- Agreement to undergo a course of treatment (e.g., psychiatric, substance abuse)

- Agreement to forgo future appeals
- Restitution. Wis. Stat. § 973.20.
- Agreement to cooperate with the police or prosecution

❑ Consider other arguments on the client's behalf, such as the following:

- Appeals to justice, fairness, and equity (e.g., the charges are excessive)
- The crime's nonviolent character
- The crime's lack of effect on the victim and the community
- The defendant's lack of a prior criminal record
- The risk of deportation
- The relationship, if any, between the defendant and the victim
- The defendant's youth, advanced age, or poor health
- The defendant's work record
- Special considerations about the defendant (e.g., the defendant is remorseful)
- Special considerations about the victim (e.g., the victim has a bad character; the victim precipitated the crime; the victim has forgiven the defendant)
- The defendant's change in lifestyle since the crime
- Weaknesses in the state's case or strengths in the defense case
- The hardship to witnesses of testifying
- Prison or jail overcrowding

❑ Let the district attorney make the first offer.

❑ If the desired agreement is not reached at first, be patient and look for new angles and openings.
❑ Leave the prosecution a face-saving line of retreat.

❑ Discuss *all* offers with the client. Every offer shared with the client should be documented. *See* SCR 20:1.4.

❑ If an agreement is reached, put it in writing and send it to the district attorney, with a copy to the client.

☐ If the case goes to trial, continue trying to obtain a favorable settlement through the appeal stage.

D. Factors Affecting the Plea Decision

☐ The client's wishes (paramount factor: client makes the final decision)

☐ The client's admission or denial that the client committed the act with which the client is charged

☐ The best possible result consistent with the client's wishes

☐ The strength of the state's case

☐ The strength of the defense's case

☐ The nature of the offense and its likely effect on a jury

☐ Publicity surrounding the case

☐ Jury attitudes in the county (based on counsel's experience, investigation of the panel, or previous verdicts)

☐ The judge assigned to the case

☐ The prosecutor's experience, ability, and personality

☐ The likelihood that errors would be committed during trial that would justify a new trial (based on the substance of the legal issues that will arise during trial and an analysis of the skills of the judge and prosecutor)

☐ The likelihood that during trial, details of the crime would come out that could result in a harsher sentence

☐ The likelihood that a trial would bring out extenuating or mitigating circumstances that might not otherwise come to light

☐ How soon the case would be tried (especially if the client is in jail and unable to post bail)

☐ The likelihood that the client would suffer embarrassment or adverse publicity because of a trial

☐ The psychological effect of a trial on the client

☐ The likelihood that the victim would arouse sympathy in the judge or jury

☐ Whether the client wishes to testify

☐ Whether the client would be a good witness

☐ Whether the client's testimony is necessary for the defense or would be helpful to the case

☐ The client's criminal record, if any

☐ The likelihood that the judge would believe the client's testimony to be perjured and, consequently, might impose a harsh sentence

☐ The advantages and disadvantages of the proposed plea bargain

E. The Plea Decision

☐ Review and evaluate the prosecution's offer with the client.

☐ Allow the client reasonable time to consider offer.

☐ Obtain the client's decision.

☐ If the client chooses to plead guilty or no contest, make sure the client understands the consequences of the plea and is entering the plea voluntarily, including whether the conviction will definitely or possibly result in deportation. Wis. Stat. § 971.08; *State v. Trochinski*, 2002 WI 56, ¶¶ 17, 20–22, 253 Wis. 2d 38, 644 N.W.2d 891; *Bangert*, 131 Wis. 2d at 256–62.

☐ Review and have the client sign a Guilty Plea Questionnaire and Waiver of Rights (*infra* Form 8.71A).

VII. Checklist for the Arraignment (CRM-0005) [§ 1.65]

A. Before the Arraignment

☐ Explain the arraignment to the client.

☐ If necessary, file a bail motion and prepare for a bail hearing in conjunction with the arraignment. Wis. Stat. § 969.08.

☐ If the decision is to try the case, discuss with client the pros and cons of trying the case to a jury or to the court and decide whether to waive a jury (a jury may be waived later, so waiving it at the arraignment is generally inadvisable unless part of a plea agreement).

☐ If a substitution of the trial judge is desired, file a motion for substitution before making any other motions and before the arraignment. Wis. Stat. § 971.20.

B. At the Arraignment

☐ On the record, state that the appearance is a special appearance with reservation of all rights to make jurisdictional and other objections. *State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975).

☐ Enter the agreed-on plea(s). Wis. Stat. § 971.06.

☐ Demand a jury trial or a trial to the court.

☐ In a felony case, obtain a copy of the information. Wis. Stat. § 971.05(3).

☐ Compare the information with the findings of the preliminary-examination judge.

☐ Move for a change of place of trial, if desired. Wis. Stat. § 971.22.

C. After the Arraignment

☐ In a felony case, motions must be filed within 10 days after arraignment. File appropriate motions and schedule hearings. Wis. Stat. § 971.31(5)(a).

☐ File a discovery demand or motion, if one has not already been filed. Wis. Stat. § 971.23.

☐ Continue the investigation.

☐ Discuss discovery and possible settlement with the prosecutor.

VIII. Checklist for Trial (CRM-0006) [§ 1.66]

A. Before Trial

☐ Continue the investigation.

☐ Continue trial preparation.

☐ Challenge the venire, if appropriate.

☐ Investigate prospective jurors.

☐ Prepare trial briefs on issues that you expect will arise during trial.

☐ Review the standard instructions that you intend to request or to oppose; prepare any special jury instructions.

☐ Work on your closing argument. Remember that the jury will be given a copy of the jury instructions to have with them during the deliberations. Wis. Stat. § 972.10(5).

☐ Consider filing motion(s) in limine. *State v. Wright*, 2003 WI App 252, ¶¶ 37, 40, 268 Wis. 2d 694, 673 N.W.2d 386.

☐ Give notice of intent to use any learned treatises at least 40 days before trial. Give notice of intent to use any rebutting treatises within 20 days after service of the original notice. Wis. Stat. § 908.03(18).

☐ At least 40 days before trial, file certified, accurate, legible, and complete copies of any hospital records that will be used. Wis. Stat. § 908.03(6m)(b).

☐ File any notice of alibi at least 30 days before trial. Wis. Stat. § 971.23(8).

☐ If appropriate, file a motion for a protective order, for the in camera inspection of certain discoverable materials, or for sanctions for a discovery violation. Wis. Stat. § 971.23(6), (6m), (7m).

☐ Verify that any court-appointed physician's report on the defendant's mental responsibility is filed at least 10 days before trial. Wis. Stat. § 971.16(3).

☐ File any defense expert witnesses' reports on the mental responsibility of the defendant not less than 15 days before trial. Wis. Stat. § 971.16(4).

☐ File any motions to ensure presence of prisoner witnesses and out-of-state witnesses. Wis. Stat. §§ 976.02, 782.44.

☐ Prepare the client for trial. Discuss trial procedure, the importance of client's demeanor and appearance at trial, and if client is in custody, arrange for appropriate clothing for client and for court order that client be allowed to appear at trial unshackled and in civilian clothes.

B. At the Opening of Trial

☐ Renew and preserve any jurisdictional objections.

☐ Renew discovery demands or motions, including the demand for criminal records of prosecution witnesses. Wis. Stat. § 971.23; *Jones v. State*, 69 Wis. 2d 337, 347–52, 230 N.W.2d 677 (1975).

☐ Renew any demands for exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468 (*Brady* duty to disclose applies even if material is *not* in exclusive possession and control of the state); *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

☐ Move for copies of statements of all prosecution witnesses, if not already provided by the state. Wis. Stat. § 971.23(1)(e).

☐ Move for an order excluding witnesses and keeping them separate, or preventing them from communicating with one another, until they have been examined or until the trial or hearing is ended. Wis. Stat. § 906.15.

☐ Move that the court disclose the opening instructions. Wis. Stat. § 972.10(1)(b).

☐ Note any objections to the court's opening instructions. Wis. Stat. § 972.10(1).

☐ Prepare additional opening instructions relating to the duties of jurors. Wis. Stat. § 972.10(1).

☐ Make motions relating to jury note-taking, use of cell phones, use of computers, and any other issues regarding jury. Wis. Stat. § 972.10(1)(a).

☐ Move to record voir dire, opening statements, and closing arguments. SCR 71.01(2).

☐ Move to exclude or limit the use of electronic media or still photography in the courtroom. Wis. Stat. § 757.14; SCR 61.01–.12; *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *State ex rel. La Crosse Trib. v. Circuit Ct.*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983).

☐ Move to limit trial publicity by the prosecutor. SCR 20:3.6.

☐ If the judge has the practice of introducing the parties and witnesses to the jury, insist that witnesses not be identified as either prosecution or defense witnesses. Insist that no witness be identified as a "victim."

☐ Object to the prosecutor's use of peremptory challenges that limit or eliminate representation on the jury of men, women, or persons of certain races or ethnicity. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

☐ Move to sequester witnesses. Wis. Stat. § 906.15.

☐ Move to clarify the number of convictions to be used to impeach the credibility of each witness, including the defendant if the defendant chooses to testify. Wis. Stat. § 906.09(3).

☐ Move to exclude any witness not listed on the state's witness list. Wis. Stat. § 971.23(1)(d), (7m).

☐ Move to prohibit the state from using or referring to any statement(s) made by any witness whom the state intends to call at trial if the statement(s) inculpates the defendant, unless a copy of statement(s) was previously provided to defense counsel. Wis. Stat. § 971.23(1)(e), (7m).

C. At the Close of the State's Case

☐ Move for dismissal. Wis. Stat. §§ 805.14(3), 972.10(4).

☐ Renew any motions on which the court failed to rule during trial or on which the court did not allow argument.

D. At the Close of All the Evidence

☐ Move that all your exhibits be received as evidence.

☐ Move for dismissal or for a directed verdict of acquittal. Present a trial brief in support of the motion. Wis. Stat. §§ 805.14(4), 972.10(4).

☐ Renew all motions for a mistrial.

☐ Make a record of everything relating to the case that was done "off the record" and has not already been recorded.

☐ Submit proposed or requested instructions at the instructions conference. Make sure your requests are on the record, along with your objections to any instructions. State your objections with particularity.

☐ Out of the jury's presence, raise all issues on which the court failed to rule during trial or on which you were not allowed argument.

☐ Be prepared to argue as to which exhibits should go to the jury.

☐ Be prepared to argue against giving an *Allen* charge to the jury (an *Allen charge*, also known as a *dynamite charge*, is a jury instruction intended to encourage a deadlocked jury to reach a verdict. *See Allen v. United* States, 164 U.S. 492, 501 (1896) (upholding instruction during jury deliberations to give deference to other jurors' opinions and to reconsider whether a doubt about guilt was reasonable if not shared with other jurors)). Wis. JI—Criminal 520; American Bar Ass'n, *Standards for Criminal Justice—Trial by Jury* § 15-5.4 (3d ed. 1996).

E. After the Verdict

☐ If the defendant is found not guilty, move for a judgment on the verdict. Wis. Stat. § 805.14(5)(a).

☐ If the defendant is found guilty by a jury, ask to have the jurors polled. *State v. Behnke*, 155 Wis. 2d 796, 806, 456 N.W.2d 610 (1990); *State v. Wojtalewicz*, 127 Wis. 2d 344, 379 N.W.2d 338 (Ct. App. 1985).

☐ If the defendant is found guilty, move for a judgment notwithstanding the verdict. Wis. Stat. § 805.14(5)(b).

IX. Checklist for Sentencing (CRM-0007) [§ 1.67]

A. Before Sentencing

☐ After a felony conviction, consider whether to request that Department of Corrections conduct a presentence investigation and report. Wis. Stat. § 972.15.

☐ Prepare to rebut the use of previous convictions as a basis for an increased sentence.

☐ Consider possible arguments against incarceration, such as the following:

- Incarceration is not necessary to protect the community.
    - The defendant has a nonviolent history.
    - The defendant had limited involvement or culpability.
    - The crime was an isolated incident.
    - The factors leading to the crime have been alleviated (e.g., the defendant has obtained needed psychiatric or substance abuse help).
- Incarceration is not necessary to rehabilitate the defendant.
    - The defendant has already taken the first and most important step toward rehabilitation—recognizing and accepting responsibility for the crime.
    - The defendant has obtained needed professional help to deal with personal problems.

  - The defendant has already been, and will continue to be, punished (e.g., time spent in jail before conviction or posting bail, personal humiliation over the charge, attorney fees, lost wages, fines, costs, and restitution).
  - Conviction for a crime, especially a felony, causes future adverse consequences.
  - Probation is not a mere "slap on the wrist" but is a significant deprivation of liberty.
- Incarceration would be inappropriate and unjust.
  - Incarceration would prevent payment of restitution, costs, fines, and attorney fees.
  - Incarceration would punish the defendant's family by removing a breadwinner and needed parent.
  - Incarceration would be an unnecessary burden on the taxpayers, who would have to pay to house and feed the defendant in a county jail, house of correction, or state prison and to support the defendant's family through need-based programs.

☐ In appropriate cases, seek alternatives to a criminal conviction and sentence. *See infra* chs. 6, 8.

☐ In appropriate cases, seek alternatives to a sentence of incarceration, such as the following:

- Restitution. Wis. Stat. § 973.20.
- Community service. Wis. Stat. §§ 943.017(3), 973.07.
- Probation. Wis. Stat. §§ 973.09, 973.11.
- Huber Law release privileges. Wis. Stat. §§ 303.08, 973.09(4).
- Electronic monitoring. Wis. Stat. §§ 302.425(2), 973.03(4).

☐ Try to influence the presentence report.

- Provide the writer of the presentence report with appropriate helpful information. Presentence report writers usually want the following information:
  - An autobiographical sketch of the defendant
  - The defendant's statement of participation in the offense
  - A list of persons whom the presentence report writer can contact to provide positive information about the defendant
- Prepare the defendant, the defendant's family and employer, and others for questioning by the presentence report writer.
- Consider providing an alternative presentence report. Employ a social worker, psychiatrist, or psychologist to test the defendant and write a report for the court that proposes an alternative to incarceration.

☐ Examine the final presentence report carefully.

- Obtain a copy before the sentencing hearing and review it with the defendant.

  - The defendant has a due-process right to have the sentencing court consider accurate information. Thus, if there are any inaccuracies, attempt to have them corrected. If necessary, request an adjournment of the sentencing hearing to rebut incorrect assertions contained in the presentence report. *State v. Tiepelman*, 2006 WI 66, ¶¶ 9–28, 291 Wis. 2d 179, 717 N.W.2d 1.

- ☐ Prepare the defendant for the sentencing hearing.
  - Make sure the defendant will be appropriately dressed (i.e., to show respect for the court and an appreciation of the seriousness of the situation). Advise the defendant on proper behavior at the hearing.
  - Assist the defendant in preparing and rehearsing the *allocution* (a statement made to the court by the defendant after pleading guilty). A proper allocution should contain the following elements:
    - An acceptance of responsibility for the defendant's acts (if the defendant admits the acts)
    - A statement of remorse expressing sincere sorrow for pain, suffering, and loss caused by the defendant's acts
    - A statement of honest resolve never again to become involved in criminal activity
    - A plea for mercy
  - Prepare the defendant to humbly answer the judge's questions and, if appropriate, to present an explanation of the circumstances that led to the crime (while accepting full responsibility for the criminal conduct).
  - Instruct the defendant to not react inappropriately to any statements made by the victim, the victim's relatives, or other individuals.
  - Discuss the sentence with the defendant.
    - Advise the defendant of the maximum potential sentence.
    - Give the defendant the benefit of your experience by explaining what you anticipate as a sentence.
    - Discuss with the defendant your proposed sentencing strategy and any arguments in support of the sentence you intend to propose.
    - Discuss with the defendant the available sentencing alternatives. Explain the obligations the client would have to undertake in conjunction with the various alternatives.
    - Be realistic. Advise the defendant that there are no guarantees.
    - Resolve any disagreements with the defendant about your sentencing strategy before the hearing.
    - Attempt to persuade the defendant of the logic behind your tactics but concede any unresolved differences to the defendant.
  - Explain the appellate process to the defendant.
    - Give the defendant a realistic appraisal of the chances of success on appeal.
    - Ask the defendant under what circumstances you should begin the appellate process.

- If the defendant entered a guilty or no-contest plea, ascertain whether the court requires that you complete a form with the defendant that explains the rights being waived and the potential consequences of the plea. Form 8.71A, *infra*, is an example of such a form. Complete the form if required.

- Explain Form CR-233, Notice of Right to Seek Postconviction Relief (*infra* Form 8.71A), and execute the form with the defendant.

- If the defendant is not a citizen, discuss the potential for deportation. 8 U.S.C. § 1182; 8 U.S.C. § 1227; *Padilla v. Kentucky*, 559 U.S. 356, 365–74 (2010); *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93.

☐ Plan for witnesses.

- If appropriate, plan to have relatives testify on the defendant's behalf (e.g., the defendant is needed by the family for financial and emotional support; the defendant has been a good and conscientious parent and breadwinner; relatives will assist the defendant to avoid future trouble).

- If possible, plan to bring in a social worker, psychiatrist, or psychologist to testify that the defendant is receiving needed help and that criminal behavior is unlikely to recur.

- If possible, plan to bring in an employer to show that the defendant has a good work record and that a job is available.

- If possible, plan to present additional character witnesses (e.g., religious adviser, coworkers, teachers, neighbors) to show that the community would suffer a loss if the defendant were incarcerated. If the defendant is involved in service to the community, bring in coworkers or supervisors.

- Provide the court with written reports or letters from witnesses who are not available to appear in court (hearsay is generally admissible at sentencing hearings).

    - Solicit the letters of reference or recommendation in advance.

    - Tell the writers what options are available to the judge; ask them to write letters explaining who they are, what relationship they have to the defendant, and what they believe to be an appropriate disposition of the case and why. Explain that anecdotal information is very helpful.

    - Ask that the letters be addressed to the judge but sent to you. Make a strategic decision on when to submit them to the judge, the district attorney, and the writer of the presentence investigation report.

- Try to anticipate and influence the judge's sentence.

- Find out as much as possible about the judge's sentencing proclivities.

- If the district attorney's recommendations carry great weight with the judge, seek to have the district attorney join in a recommendation, or at least remain silent.
- Send a letter to the judge stating what you believe to be an appropriate sentence in the case and why. Send a copy of the letter to the district attorney. SCR 20:3.5(b).

- If the judge typically considers a risk assessment, prepare a draft of any applicable worksheet or review any worksheet previously prepared. Wis. Stat. § 973.017(2).

☐ Make sure the defendant receives credit for all presentence incarceration. Wis. Stat. § 973.155.

B. After Sentencing

☐ Advise the client of the following postconviction and appellate rights:

- Right to move for a new trial
- Right to move to modify sentence
- Right to appeal
- Right to move to withdraw plea

Wis. Stat. § 974.02; *infra* ch. 9.

☐ File a notice of intent to pursue postconviction relief, if appropriate, after full consultation with the client. Wis. Stat. § 809.30.

Chapter 2

Organizing the File

I. Introduction [§ 2.1]

There is no single correct way to organize information or manage files. This chapter suggests just one of many suitable methods to organize paper or electronic files.[1]

Initially, attorneys must decide to what extent they will employ technology in file management. Electronic file management systems may cost less, save time, and—when set up correctly—provide more security to client materials. At a minimum, electronic file management requires an encrypted hard drive, a secure backup system (e.g., cloud-based recovery), and a scanner. More advanced web-based case management programs, such as Clio, MyCase, and Zola Suite, use built-in systems to manage many aspects of client matters. These include time and billing, payment processing, conflict checking, calendaring, document automation, task and workflow management, and much more.

Attorneys who choose to maintain electronic files must protect the confidentiality of client materials and ensure the accessibility and transferability of the file. The Wisconsin Supreme Court Rules and the State Bar of Wisconsin are sources of more information about the ethics of electronic file management. SCR 20:1.1 (competence), 20:1.3 (diligence), 20:1.6 (confidentiality), 20:1.15 (obligation to safeguard client property); Christopher C. Shattuck, *Managing Your Digital Files*, Wis. Law., June 2018, https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=26403; Timothy J. Pierce, *Maintaining Electronic Client Files*, Wis. Law., Mar. 2006, https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=1052.

While the purpose of this chapter is to assist attorneys in organizing and managing their files, it is important to not allow efficiency and optimization to lure the attorney into the trap of over-working oneself. Joseph A. Bugni, *Postmortem of a Breakdown: A New Approach to Work*, Wis. Law, May 2024, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=97&Issue=5&ArticleID=30414. Attorneys still have a duty to their clients, themselves, and those around them to not take on more work than they can handle. SCR 20:1.1 (competence); State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-84-11 (1998), https://www.wisbar.org/formembers/ethics/Pages/Formal-Opinions.aspx; *see also* ABA Standing Comm. on Ethics & Prof'l Responsibility Op. No. 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (May 13, 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_aba_ethics_on_excessive_caseloads.authcheckdam.pdf.

Whether relying on paper files or entering all information and every document into a sophisticated database program, every office needs an orderly and uniform approach to ensure effective representation and efficient use of time. Every criminal case file should be set up in a similar manner, so that anyone can access information and work on the case at any time, even if they were not involved at the start. An effective method is to divide the file into readily recognizable sections, such as the following:

1. To Be Done;

2. Confidential Client Information;

3. Investigation and Facts;

4. Pleadings;

5. Correspondence and Messages;
6. Case Log;
7. Checklist of Time Limitations;
8. Legal Research;
9. Case Analysis; and
10. Sentencing.

In the To Be Done section, the attorney should keep a running list of actions that must be taken in the case. *See infra* Form 2.2A. This list should be among the materials the attorney takes to the initial interview with a new or prospective client. *See infra* ch. 3 (Conducting the Initial Interview). Thereafter, the list should be kept up to date. The following are examples of items that might be included on a To Be Done list:

1. Draft and file discovery demand.
2. Draft and file motion to dismiss complaint.
3. Conduct investigation into witnesses identified by client.

The To Be Done list should be the first thing in the file so the attorney sees it every time the attorney opens the file.

The Confidential Client Information section should contain all the information the attorney has or needs relating to the client. This includes the Master Information List, *infra* Form 3.111A, and the Office Master File (*see* How to Use This Book, *supra*). This section will likely be one of the first "completed" upon opening the file but should be updated throughout the case—especially if the client's contact information changes. The attorney will come back to this page often throughout the representation.

The Investigation and Facts section is the heart of the file. It contains the information the attorney needs to evaluate the case and counsel the client. It should include all police and other law enforcement reports, reports of defense investigators, witness statements, medical and scientific reports, witness lists, responses to discovery demands or motions, and similar materials. The attorney should have a way to document when discovery is provided by the state. It will often be the case that discovery is provided by email, an electronic drop box, or cloud service (e.g., evidence.com or Cerberus); the attorney should be diligent about preserving emails and adding them to the file as well as noting when discovery is uploaded to and downloaded from a drop box. It is not unusual to proceed to trial and find that the state has failed to disclose discoverable material to the defense. The ability to prove what discovery has been provided by the state, and exactly when it was received, may be crucial in winning a continuance or a motion to exclude. If the material in the Investigation and Facts section is voluminous, dividing it into subsections and organizing it, for example, by witness name or topic, may help when it is time to create the Trial Outline. *See infra* ch. 7 (Preparing for Trial).

The Pleadings section should hold all of the case's formal documents, such as complaints, informations, motions, briefs, discovery demands, court orders, and scheduling notices. The advent of e-filing in Wisconsin allows an attorney to "Download all documents" filed with the court at the beginning or end of the case to ensure everything is retained.

In the Correspondence and Messages section, the attorney should maintain a chronological record of all written contacts (including email, text, and other electronic messages) about the case. Letters, notes from clients or witnesses, telephone-message slips, text messages, and email correspondence should be saved and filed. Whether done along the way or before closing the file, all correspondence should be compiled in one place. Seemingly inconsequential messages or notes may prove indispensable in locating a witness—or even the client. It is especially important to document every phone number and email address the client uses to contact the attorney because they also might prove useful.

The Case Log, *infra* Form 2.3A, is a chronological record of the attorney's actions in the case. Most lawyers are accustomed to keeping records of billable hours, and web-based applications such as Bill4Time, TimeTracker by Ebillity, and TimeSolv make tracking billable hours simple. Although the Case Log can provide the basis for billing a client or the State Public Defender (SPD), it should be more detailed than a simple record of billable hours. It should include a summary, by date, of everything that has happened in the case—the legal equivalent of the journalistic *who*, *what*, *when*, *where*, *why*, and *how*. For example, whenever the prosecutor says something to the attorney about the case, it should be noted in the Case Log. Other matters that should be included are offers of settlement, possible areas of investigation, descriptions of contacts with probation agents or witnesses, and the attorney's subjective impressions about the case.

The attorney might choose to combine the Case Log with the Correspondence and Messages section, to keep a single running record of contacts and activities in the case.

The Checklist of Time Limitations, *infra* Form 2.4A, lists, in chronological order, some of the key deadlines in a criminal case and explains how they are calculated. The attorney should use the checklist to calculate the deadlines for the specific case and then should have the dates recorded in the office "tickler" or electronic reminder system. The dates also can be noted on the checklist itself, to provide a complete record of deadlines in the file.

The Legal Research section should contain statutes and case law specific to legal issues that arise in a particular case. The file should clearly document the laws reviewed and analysis undertaken. Two essential research tools are (1) Fastcase (an electronic legal research library, available to State Bar of Wisconsin members through https://www.wisbar.org); and (2) On Point (a blog providing updates on the most recent Wisconsin Supreme Court and Court of Appeals decisions, available at https://www.wisconsinappeals.net/ and @OnPointbySPD on X (formerly Twitter)). Automatic notifications through On Point are especially helpful in keeping track of recent legal developments.

It can be helpful to maintain a research library, divided into specific legal topics, such as unlawful seizure, de facto arrest, sentence credit, etc. This can help attorneys and staff members quickly research issues that come up frequently and help attorneys refresh themselves when tackling more complex areas of law. Relevant case law and statutes researched should be documented in a client's Legal Research folder. The research library should be updated with cases discovered during the representation of each client.

The Case Analysis section should contain the attorney's written analysis of the elements of the crime charged against the client, the working theory of defense, and the client's goals for the case. See chapter 4, *infra*, for a thorough discussion of case analysis.

The final section in every criminal case file should be titled Sentencing. Early in the case, the defense attorney should begin preparing for the possibility that the client might be found guilty and face sentencing. The Sentencing section should include the lawyer's notes about which tactics could be used to mitigate the sentence. It might include a detailed social history of the client or alternative presentence investigation report prepared by a social worker, psychiatrist, or psychologist; character-reference letters; or letters from employers in support of the client. Most important, the Sentencing section should prompt the attorney to reflect on positive attributes of the client that the court would not otherwise know so that the attorney can express them to the court at sentencing. See chapter 8, *infra*, for a discussion of sentencing.

An organized file is essential for effective representation. Negotiation and trial advocacy are enhanced with case preparation and file organization. An organized file enables the attorney to efficiently and effectively respond to unanticipated testimony of witnesses, arguments of opposing counsel, and rulings of the court. Whether a case reaches disposition through dismissal, negotiation, or verdict, an organized file is a key to success.

If, for whatever reason, the attorney must withdraw, an organized file will facilitate a smooth transition in representation when another attorney takes over the case. Using a uniform system allows attorneys to fill in or take over when necessary. In addition to taking the steps outlined, if the attorney knows that the file will be transferred, the transferring attorney can provide an essential service for successor counsel by drafting a summary of the case posture, client goals, upcoming court dates, and the transferring attorney's evaluation of the case.

The attorney also should be aware of the ethical obligations regarding client property in the attorney's possession, SCR 20:1.6(a), 20:1.15, and records relating to the client, including the client file, SCR 20:1.16(d). *See also* State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-16-03 (2016), https://www.wisbar.org/formembers/ethics/Pages/Formal-Opinions.aspx (scroll down to link for this opinion).

II. To Be Done: Notes and Ideas [§ 2.2]

Commentary and Instructions for Form 2.2A

Form 2.2A	To Be Done: Notes and Ideas (CRM-0008)

Form 2.2A, *infra*, should be placed in the front of the case file, so it is the first thing seen whenever the file is opened. Form 2.2A, *infra*, could be printed as a paper record to be kept in each case file, or an electronic copy could be saved and updated. All actions to be taken in a case should be listed on this form. The form provides space to note the date an item is entered and the date it is finished. The form serves as a record of tasks completed and as a reminder of tasks remaining. The "Page No." is blank so that additional pages of this form can be added as needed.

Distribution

Original:	Client file
Copy:	None

Notes

Form 2.2A To Be Done: Notes and Ideas (CRM-0008)

To Be Done: Notes and Ideas

Client's Name *(3.01)*

Case No. *(1.02)* Page No.

		Date Entered	Date Done
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
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16.			
17.			
18.			
19.			
20.			

III. Case Log [§ 2.3]

Commentary and Instructions for Form 2.3A

Form 2.3A	Case Log (CRM-0009)
Form 2.3B	Sample Case Log (CRM-0214)

The following Case Log can be used both to record the attorney's billable hours and to document, by date, everything that happens in the case. Although every attorney is accustomed to keeping track of billable hours, the Case Log should contain more detailed information, so that anyone would know the status of the case after reading the Case Log. Form 2.3A, *infra*, could be printed as a paper record to be kept in each case file, or an electronic copy could be saved and updated. Whatever record-keeping system is used, in criminal cases it is necessary to maintain a complete chronological history of the case. Something as simple as an Excel spreadsheet can serve as an effective log. One example of such a spreadsheet is at Form 2.3B. This sample includes sections for keeping dates, notes, time spent in and out of court, and an ↗ indicating travel time. The "Total" at the bottom will automatically calculate the time entered in each column.

Form 2.3A, *infra*, is an adaptation of a form used by the SPD's office. The column marked "Out-of-Cnty. Travel" is included because the SPD requires separate billing of that item.

Distribution

Original:	Client file
Copy:	None

Notes

Form 2.3A Case Log (CRM-0009)

Case Log

Client's Name: *(3.01)*
Attorney's Name *(2.01)*
Case No. *(1.02)* Page No.

Date	Activity Comments or Notes	In-Court Hrs/Tenths	Out-of-Court Hrs/Tenths	Out-of-Cnty. Travel* Hrs/Tenths
		.	.	.
		.	.	.
		.	.	.
		.	.	.
		.	.	.
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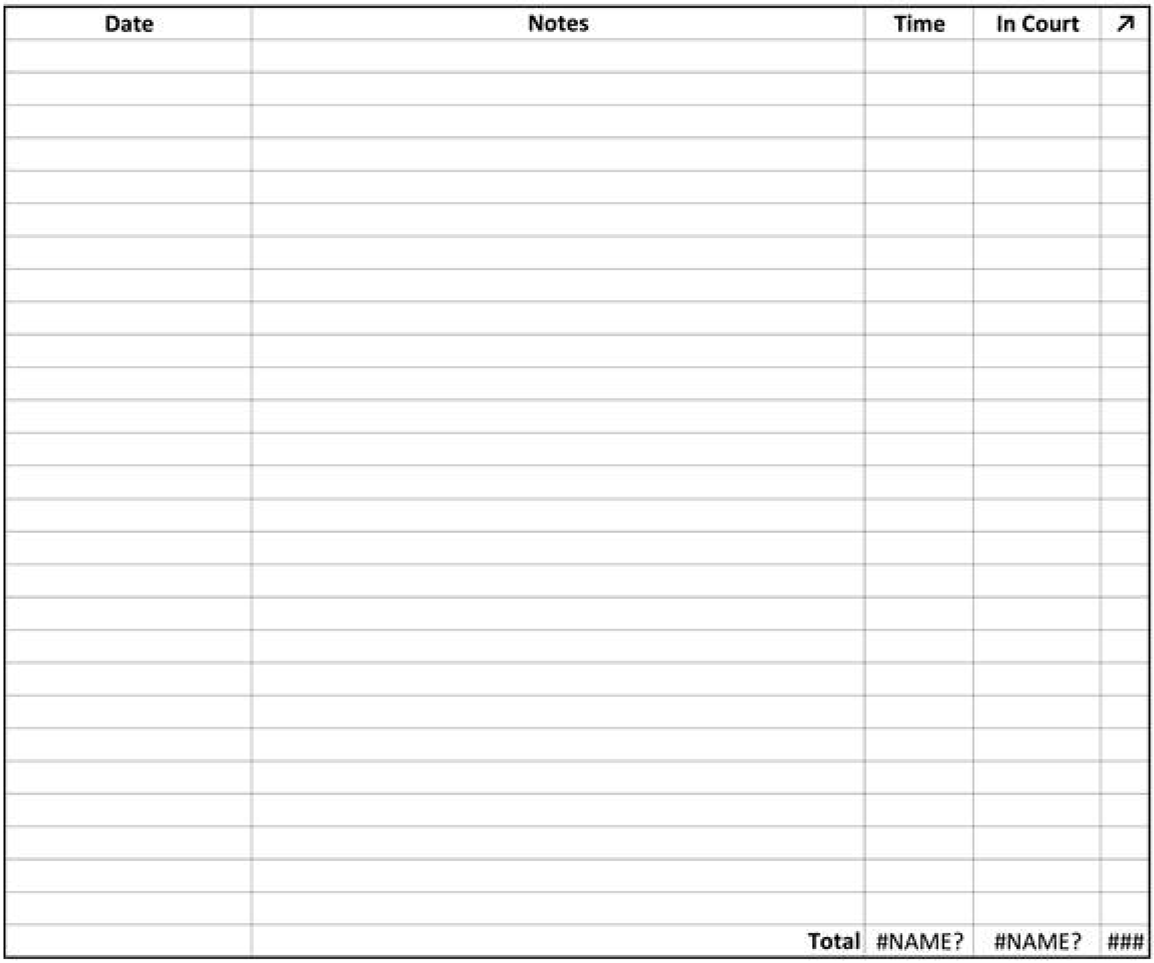
		.	.	.
		.	.	.
		.	.	.
		.	.	.
	Totals/Subtotals	.	.	.

* List travel time for out-of-county trips only, but include both the time spent traveling in county and out of county on these trips.

Form 2.3B Sample Case Log (CRM-0214)



Date	Notes	Time	In Court	↗
	Total	#NAME?	#NAME?	###

IV. Checklist of Time Limitations [§ 2.4]

Commentary and Instructions for Form 2.4A

Form 2.4A	Checklist of Time Limitations (CRM-0010)

Without a system for keeping track of dates, missed deadlines are inevitable. The Checklist of Time Limitations is designed specifically for criminal cases. It lists, in chronological order, common deadlines and explains how the deadlines are calculated, citing applicable statutes and referring to pertinent forms in the book.

Deadlines should be calculated as early as possible in a case. Once calculated, the dates should be entered in the office tickler system. The dates may also be noted in the rightmost column of the checklist itself, thus making a complete record in the case file of applicable deadlines.

The defense attorney should always check local court rules, which may establish other deadlines not noted here. Local rules are available online at https://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx (last visited Aug. 11, 2024).

Distribution

Original:	Client file
Copy:	None

Notes

Form 2.4A Checklist of Time Limitations (CRM-0010)

Checklist of Time Limitations

Client's Name *(3.01)* Case No. *(1.02)*

Date of Offense ____________ Date of Arrest ____________

Date of Arraignment ____________ Date of Sentencing[1] ____________

Date Released on Bail[2] ____________ Date Department of Corrections

Hold Lifted[3]

Event	Wis. Stat. §	Forms	When Event Must Occur	Deadline
Prosecution for offense (statute of limitation)	939.74(1) 939.74(2)(a), (am) 939.74(1) 939.74(2)(b) 939.74(2)(c) 939.74(2) (cm) 939.74(2)(d) 939.74(4) 939.74(2), (2d)	5.34A	• Most felonies: Within 6 years • Homicide and specified sexual assaults against a child: No time limitation[4]/within 15 years[5] • Misdemeanor or adultery: Within 3 years • Theft (misappropriation): Must be commenced within 1 year after discovery of loss, but no more than 5 years after time limitation in Wis. Stat. § 939.74(1) • Sexual abuse of a child, including repeated sexual assaults on same child and intentional causation of "great bodily harm" to a child: Before victim is 45[6] • Child trafficking: Before victim is 24 • Causation of, or failure to prevent, bodily or mental harm to a child; or child enticement for purpose of causing bodily or mental harm to child or giving or selling controlled substance to child: Before victim is 26 • Sexual exploitation by therapist: Limit extended by time that alleged victim is unable to seek criminal complaint because of actions of therapist • DNA extension: If DNA collected before limitation period expires, prosecution may begin in certain sexual-assault and child-abuse cases within 1 year after DNA match is discovered (or at any time in cases brought under Wis. Stat. § 940.225(1))	
Execution of search warrant	968.15(1)	5.45A–5.45C	Not more than 5 days after issuance	

Return of search warrant	968.17(1)	5.45A–5.45C	Within 48 hours after execution of warrant, together with inventory of property taken	
Filing of affidavit or complaint made in support of warrant	968.17(2)	5.45A–5.45C	Within 5 days after execution of warrant	
Notification of right to counsel	967.06		As soon as practicable after person is detained or arrested	
Application for indigency determination	967.06	10.25A–10.25F	Immediately after person's statement of wish to be represented and inability to pay	
Motion for modification of bail	969.08(3)	5.50A	On reasonable notice	
Notice of change of address of person released on bail or other conditions	969.10		Within 48 hours after change	
Issuance of complaint	968.02	5.34A	Before statute of limitation has run, *see* Wis. Stat. § 939.74	
Initial appearance	970.01	5.22A	Within reasonable time after arrest [7]	
Objection to jurisdiction	970.01	5.23A–5.26B	Before or at initial appearance [8]	
Motion to dismiss complaint	971.31(5)(c) 971.31(5)(a)	5.23A	Felony: Before preliminary examination (or is deemed waived) [9] Misdemeanor: No later than 10 days after initial appearance	
Preliminary examination	970.03(2)	5.30A, 5.30B	• If client in custody on bond in excess of $500: Within 10 days after initial appearance • If client not in custody or bond is $500 or less: Within 20 days after initial appearance	
Filing of information	971.01(2)	5.31A, 5.31B	Within 30 days after preliminary examination, unless time extended for cause	

Request for substitution of judge	971.20	5.20A	• Judge assigned to preliminary examination: At least 5 days before preliminary examination, unless court otherwise permits
			• Trial judge originally assigned: Before making any motions to trial court and before arraignment
			• Trial judge subsequently assigned:
			  • Generally: Within 15 days after notice of assignment
			  • If notice given within 20 days before trial: Within 48 hours after notice
			  • If no notice or notice given within 48 hours before trial: Oral or written request may be made before trial begins
			• Following appeal: within 20 days after the filing of the remittitur by the appellate court (Wis. Stat. § 801.58(7) is the corresponding civil statute)	

Motion to transfer jurisdiction to juvenile court	938.183(1m); 970.032(1), (2), 970.035		Before arraignment [10]	
Amendment of complaint, indictment, or information	971.29(1)		• Before trial: Any time before arraignment, without leave of court • At trial: If not prejudicial to defendant	
Arraignment	971.05		No specified time limitation [11]	
Entry of plea	971.05(3), (4)		At arraignment unless pretrial motion filed that must be determined before entry of plea	
Motion for change of trial location	971.22(1)	5.53A, 5.53B	At arraignment, unless time extended for cause	
Pretrial motions	971.31(5)(a)	5.17A–5.56D	Unless court otherwise permits: • Misdemeanor: Within 10 days after initial appearance • Felony: Within 10 days after arraignment	
Discovery of defendant's statements and names of witnesses [12]	971.23(1)(a), (b)	5.36A, 5.36B 5.40A, 5.40B	On demand and within reasonable time before trial	
Discovery of defendant's prior criminal record	971.23(1)(c)	5.36A, 5.36B	On demand and within reasonable time before trial, if within state's possession	
Discovery of witness lists	971.23(1)(d), (2m)(a)	5.40A, 5.40B	On demand and within reasonable time before trial	
Disclosure of witnesses' criminal records	971.23(1)(f), (2m)(b)	5.36A, 5.36B	On demand and within reasonable time before trial	

Disclosure of witnesses' statements	971.23(1)(e), (2m)(am)	5.36A, 5.36B	On demand and within reasonable time before tria	
DNA evidence	971.23(9)		Notice of intent to use DNA evidence at least 45 days before trial, regardless of discovery demand; information required by Wis. Stat. § 971.23(1)(e) or (2m)(am) within 15 days after request	
Protective order	971.23(6)		No specified time limit[13]	
Inspection of physical evidence	971.23(1)(g), (2m)(c), 971.31(5)	5.36A, 5.36B	On demand and within reasonable time before trial	
Motion for scientific testing	971.23(5), 971.31(5)	5.39A, 5.39B	Unless court otherwise permits: • Misdemeanor: Within 10 days after initial appearance • Felony: Within 10 days after arraignment	
Notice of intent to introduce learned treatise	908.03(18)(a)		At least 40 days before trial	
Notice of intent to introduce rebutting learned treatise	908.03(18)(b)		No later than 20 days after service of original notice under Wis. Stat. § 908.03(18)(a)	
Service of notice of availability of certified, accurate, legible, and complete copies of medical records	908.03(6m)(b)		At least 40 days before trial or hearing	
Notice of intent to introduce audiovisually recorded oral statements of children	908.08(2)(a), 971.23(1)(e)	5.36A, 5.36B	Not less than 10 days before trial or hearing, or at such later time as court or hearing examiner permits upon cause shown	
Initiation of competency proceedings	971.14(1)(a)		Whenever reason to doubt defendant's competency arises	
Completion of competency examination	971.14(2)(c)		• Inpatient: Within 15 days after examination ordered or as specified in Wis. Stat. § 971.14(2)(am)[14] • Outpatient: Within 30 days after examination ordered	

Reexamination of competency	971.14(5)(b)	-	3, 6, and 9 months after commitment and within 30 days before expiration of commitment	
Notice of intent to appeal competency determination or involuntary medication order [15]	809.109(2)(b)	-	Within 14 days after order	
Appointment of physicians to examine defendant's mental responsibility	971.16	-	Whenever defendant has entered plea of not guilty by reason of mental disease or defect or there is reason to believe defendant's mental responsibility will become issue in case [16]	
Filing of physicians' reports on examination of defendant's mental responsibility	971.16(3)	-	Not less than 10 days before trial or at such other time as court directs	
Transmittal of expert witnesses' reports on defendant's mental responsibility	971.16(4)	-	• Defense reports to DA: Not less than 15 days before trial [17] • State's reports to defense: Not less than 15 days before trial	
Use of alibi as defense	971.23(8)	5.42A	• Notice by defense: At arraignment or at least 30 days before trial • State's response (list of rebuttal witnesses): Within 20 days after receipt of notice, or at such other time as court orders	
Trial	971.10	5.52A	• Misdemeanor: Within 60 days after initial appearance • Felony: Within 90 days after date trial demanded [18]	
Motion to transfer jurisdiction to juvenile court	938.183(1m), 971.31(13)		Before sentencing (applicable when conviction is for a lesser offense or joined offense)	
Notice of intent to pursue postconviction relief [19]	808.04(3), 809.30(2)(b)	9.47A, 9.47B	Within 20 days after sentencing	

Motion to modify sentence	973.19(1), 809.30(2)(h)	9.50A	- If no transcripts requested: Within 90 days after sentencing, or later if a "new factor" is discovered[20] - If transcripts requested: Within 60 days after service of transcript	
Petition for sentence adjustment	973.195		When defendant has served either 75% or 85% of term of confinement, depending upon felony classifications of offense (applicable to certain sentences imposed before October 1, 2009, or after August 3, 2011)	
Petition to modify bifurcated sentence because of extraordinary health condition	302.113(9g)		When defendant (1) has attained age 65 and served 5 years of confinement, (2) has attained age 60 and served 10 years of confinement, or (3) has an extraordinary health condition (petition is submitted to program review committee at correctional institution at which the inmate is confined)	
Petition to modify court-imposed conditions of extended supervision	302.113(7m)	9.52A–9.52C	- If inmate is serving confinement portion of bifurcated sentence: no earlier than one year before inmate's date of release to extended supervision - If inmate is serving extended supervision portion of sentence: no earlier than one year after inmate is released to extended supervision	
Petition for release to extended supervision for felony offenders serving life sentences[21]	302.114(2), (5)		After defendant has served 20 years or after defendant has reached the extended supervision eligibility date set by the court (may file petition no earlier than 90 days before eligibility date)	

V. Confidential Witness List [§ 2.5]

Commentary and Instructions for Form 2.5A

Form 2.5A	Confidential Witness List (CRM-0011)

Form 2.5A, *infra*, is *not* the witness list the defense attorney would furnish to the district attorney pursuant to Wis. Stat. § 971.23(2m)(a). Rather, it is intended as a confidential list to be kept in the case file; it allows the attorney to collect information about all potential witnesses, along with a summary of their expected testimony. Although the information listed on the form is easily kept in paper format, it may prove more useful if maintained electronically or entered into a computer database, especially in cases with many witnesses whose testimony may overlap.

A form should be filled out for each witness. Include each witness's name, address, and telephone number to facilitate preparation of a subpoena. The attorney should check off the appropriate boxes on the form to indicate (1) whether the witness is expected to testify for the prosecution or the defense, and (2) whether a subpoena will be issued. With this information readily available in the case file, office staff can prepare subpoenas quickly and with minimal consultation. The dates that subpoenas are issued and returned also should be recorded; this information is important when determining readiness for trial.

Distribution

Original:	Client file
Copy:	None

Notes

Form 2.5A Confidential Witness List (CRM-0011)

Confidential Witness List

Client's Name ______________________ *(3.01)* ______________________
Case No. ____________ *(1.02)* ____________ Page No. ______________________

Subpoena Information

Name ______________________________ For: ☐ State ☐ Defense
Address: ______________________________
City, State, ZIP ______________________________
Telephone No. ____________________ Subpoena: ☐ Yes ☐ No
Date Subpoena Issues ____________________ Date Returned ____________________

Brief Summary of Expected Testimony

____
____
____
____
____
____

Chapter 3

Conducting the Initial Interview

I. Introduction [§ 3.1]

At the earliest possible moment after accepting a case, the defense attorney should schedule an interview with the client. The interview serves three primary purposes: (1) establishing rapport with the client, (2) reaching an agreement on fees, and (3) gathering information. This chapter provides a guide to the initial interview and the information-gathering process, supplemented by sample forms. [1]

The attorney should prepare before conducting the initial interview. Gather and review relevant documents and information: criminal history (Wisconsin Circuit Court Access Program), criminal complaint or probable cause statement, etc. As noted in later sections, have the client file prepared and a private setting secured (if possible). It is important that the attorney begin the fact-gathering process before the initial client interview.

A client's first concerns will almost always center on three issues: (1) when he or she will be released from custody, (2) what the attorney thinks will be the outcome of the case, and (3) what is likely to happen in court. The attorney should answer these questions if at all possible. If it is impossible to answer them, the attorney should be honest and say so, telling the client that answers will be forthcoming. The client will also want to know how much the defense is likely to cost. The initial interview provides an opportunity to reach an agreement on fees. For sample fee agreements, see Forms 3.118A, 3.118B, and 3.118C, *infra*. For a discussion of indigency determinations and state public defender (SPD) representation, see chapter 10, *infra*.

Once these preliminary concerns have been addressed, the balance of the interview should be devoted to information gathering, focusing on *who*, *what*, *when*, *where*, *why*, and *how*. The interview should collect background information about the client, in addition to the facts of the alleged offense. It is best to use a standardized form that covers all the key areas likely to be relevant in a criminal case. Such a form serves as a checklist, to ensure that no crucial issue is overlooked. Filling out the form in detail in the client's presence also shows the client that the attorney has no preconceived notions about the case.

The Quick Reference Guide to the Initial Interview and the Master Information List (MIL) (*infra* Form 3.111A) in this chapter are designed to facilitate a full and complete interview with the client. The Quick Reference Guide explains the information required on the MIL and suggests ways to elicit that information from the client and others.

Some clients may be difficult to interview. The reasons for the difficulty may range from uncooperativeness to language barriers (e.g., the client does not speak English) to mental status. The attorney cannot always determine the cause of the difficulty during the initial interview. The attorney should consider possible ways of improving communication with the client, depending on the perceived difficulty. If the attorney has a substantial doubt about the client's mental competency, the attorney should request that the court order a competency evaluation, pursuant to Wis. Stat. § 971.14.

The attorney must also gain access to all relevant records concerning the client, including juvenile court records, driving records, and health-care and other records. The initial interview provides an opportunity to obtain the client's release for such records. *See infra* Forms 3.112A–.114A.

Circumstances do not always permit the attorney to cover all important details at the first meeting with a new client. The attorney may be introduced to the client in a hallway, the back of a courtroom, a county jail, a police station or sheriff's department, or a crowded "holding tank." Many of these locations are electronically monitored. It is always important to inquire whether there are monitoring devices. If there are, the attorney should ask to have the devices turned off, request another location, or seek other assurances that the attorney-client privilege will be preserved. Even with these protective measures, the attorney should always be cautious. If security is in doubt, the attorney should refrain from discussing anything confidential, limiting the interview to basic information gathering or writing out questions and answers. The client should be advised of the reasons for caution, and plans should be made for a full exploration of the facts and issues at a more secure location. It is important to explain to the client the nature of the attorney-client relationship and the special privilege that exists between an attorney and a client.

In the early stages, the attorney should approach everything as if the case will be tried before a jury. The attorney should also strive to see things from the client's perspective and to avoid looking at the strengths of the state's case or dwelling on the plight of any victim. Counsel should look for a way to win the case, rather than look for excuses for the client to plead guilty. The attorney who immediately begins to talk to the client about pleading guilty will surely lose the client's confidence. The attorney who is willing to try a case always has more credibility.

After listening to the client's version of the facts, the attorney should give the client a preliminary appraisal of the case, including any extenuating or mitigating circumstances. The attorney should also explain the client's options with regard to the plea, possible settlement, and trial.

The attorney may want to use the initial interview as an opportunity to schedule a visit to the crime scene with the client. The attorney should visit the scene as soon as possible after the interview, preferably in the client's company. It is a good idea to bring a camera.

To avoid delay in a case, the attorney or a staff person should prepare files in advance, containing all the forms and documents the attorney will need. *See supra* ch. 2 (Organizing the File). The following are examples of forms that should be included:

1. Master Information List (*infra* Form 3.111A)
2. To Be Done: Notes and Ideas (*infra* Form 2.2A)
3. Authorization for Release of Health-Care and Other Records (*infra* Form 3.114A)
4. Authorization for Attorney to Appear and Act (*infra* Form 3.117A)
5. Order Approving Defendant's Authorization for Attorney to Appear and Act (*infra* Form 3.117B)
6. Case Log (*infra* Form 2.3A)

Upon concluding the interview, the attorney should review the Master Information List or similar document to do a supplemental conflict check. As the attorney becomes aware of and contacts witnesses and investigates the case, it is important to do conflict checks as necessary. It is likely that, as the case proceeds, possible conflicts will become apparent. Determine whether conflicts exist, whether they are waivable, and communicate with the client about the conflict so that the client can decide how to proceed.

II. Quick Reference Guide to the Initial Interview [§ 3.2]

> ***Note.*** This Quick Reference Guide is designed to aid the attorney in conducting the initial interview with the client and completing the Master Information List (*infra* Form 3.111A). Sections 3.3–.6, *infra*, Preliminary Matters, and sections 3.92–.110, *infra*, Conclusion of the Interview, suggest how to begin and end the meeting with the client. The balance of the guide, sections 3.7–.91, *infra*, tracks the structure and content of the Master Information List, suggesting ways of eliciting the information needed to complete the form.

A. Preliminary Matters [§ 3.3]

1. Introductions [§ 3.4]

The attorney should introduce himself or herself and anyone else present. If anyone who accompanies the attorney is *not* a member of the defense team and hence is not covered by the attorney-client privilege, the attorney must make sure that no confidential matters are discussed. The attorney should explain how he or she came to be involved in the case (i.e., retained by the family, appointed by the SPD, etc.). It is not unusual for a new client to forget the name of his or her attorney; therefore, the attorney should make sure the client has several of his or her business cards.

2. Attorney-Client Privilege [§ 3.5]

The attorney must explain the defense attorney's role in a criminal case and the nature and extent of the attorney-client privilege. If other persons will be working on the case, the attorney must explain their roles and whether they are covered by the privilege. *See* Wis. Stat. § 905.03; SCR 20:1.6.

3. Fee Agreement [§ 3.6]

The attorney should explain the customary fee arrangement and, if possible, give the client an estimate of the cost of the defense. The attorney should have the client sign a written fee agreement. *See infra* Forms 3.118A–.118C. If it appears that the client will not be able to pay the fees, counsel should refer the client to the SPD. *See infra* ch. 10. If the attorney has already been appointed by the SPD or the court, the attorney should advise the client of the appointment.

B. Client Information [§ 3.7]

1. Personal Information [§ 3.8]

a. Name [§ 3.9]

Correct spelling of the client's first, middle, and last names is crucial. Because clients often use or are known by other names, it is also essential for the attorney to find out the following: (1) the client's name before marriage; (2) the client's name during any previous marriage(s); (3) all aliases, nicknames, street names, gang names, and legal name changes; and (4) any Native American or other traditional or ethnic names.

b. Address [§ 3.10]

In addition to the standard address (street, city, state, and ZIP), counsel should obtain details that will make it easier to contact the client (e.g., apartment number, upper or lower flat, room number). Does the client rent or own the home? The attorney should ascertain how long the client has lived at the current address and whether the client is planning a move soon. The attorney must also advise the client to keep the attorney informed of any change of address.

c. Telephone Number and Email Address [§ 3.11]

It is important to obtain full telephone numbers for landline, work, and cell phone, including the area code and any extensions. It is also important to obtain an email address. The attorney should advise the client to inform the attorney's office of any change of telephone numbers or email address. If the client does not have a telephone, counsel should obtain telephone numbers of other people willing to be contacted on the client's behalf. *See infra* § 3.25.

d. Age and Date of Birth [§ 3.12]

Many agencies cross-reference records, including criminal and traffic records, by name and date of birth. The attorney may find the date of birth helpful in determining eligibility for some special sentencing programs. The attorney may also want to know the client's birthplace.

e. Social Security Number (SSN) [§ 3.13]

The attorney should obtain the client's Social Security number. Many agencies organize records, both public and private, by Social Security numbers. Obtaining this information at the initial interview may save valuable time later on.

f. Driver's License Number [§ 3.14]

The attorney will find that the driver's license number can also be useful, especially in traffic crimes. *See infra* Form 3.113A (Request for Driver Record Abstract). The attorney also should ask for the client's driver records, if any, from other jurisdictions.

g. Citizenship [§ 3.15]

Defense counsel must determine whether the client is a U.S. citizen. If the client is not a U.S. citizen, the attorney should find out which country the client is from. How did the client come to be in this country? Is the client a legal or an undocumented immigrant? What is the date of immigration to this country? What is the client's immigration status (e.g., legal permanent resident, temporary worker, staying under student visa)? Has the client applied for citizenship? Has the client applied or petitioned for *any* relief from removal short of applying for citizenship? This information may have a bearing on the case and on whether the government will seek to deport the client following a conviction. Does the client have a passport? Does the client have dual citizenship?

If the client is not a citizen it is important to notify the client at this early, yet crucial, stage of representation that a criminal conviction can have adverse immigration consequences. If the attorney is not well versed in the area of immigration law, the client should be advised to seek the advice of an attorney practicing in immigration law. The general advice recommended in this chapter is sufficient at this stage of representation, but the attorney should be familiar with, and further advise the client pursuant to, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that defense counsel has a Sixth Amendment duty to inform noncitizen clients about immigration consequences of a charge or plea).

h. Description [§ 3.16]

Counsel should write down a brief description of the client, including race, gender, height, weight, hair color, eye color, complexion, body build, distinguishing facial or body characteristics, birthmarks, tattoos, and so on. This information can be essential in identification cases.

i. Occupation or Source of Income [§ 3.17]

The attorney should obtain the names, addresses, and telephone numbers of all employers, as well as the names of supervisors. The defense may want to call a supervisor as a witness at a bail or sentencing hearing. Counsel should find out which shifts or hours the client works or, if the client is unemployed, sources of his or her income or support.

j. Health Insurance [§ 3.18]

The attorney should find out whether the client is covered by health insurance and, if so, the attorney should obtain the insurer's name and the client's subscriber number. This information can be useful if the client needs medical, psychiatric, or psychological evaluations or treatment.

2. Family, Friends, and References [§ 3.19]

a. Marital Status and Living Arrangements [§ 3.20]

Is the client single, married, divorced, or separated? With whom does the client reside?

b. Dependents [§ 3.21]

Counsel should note the names, ages, and, if possible, dates of birth of the client's dependents. Counsel should list all people dependent on the client, including parents, foster children, stepchildren, and all others for whom the client is legally responsible, even if the client is not actually supporting them. Counsel should find out where dependents are living, if not with the client.

c. References [§ 3.22]

Having family in the area indicates ties to the community. *See infra* § 3.45. The attorney should try to obtain the names, addresses, and telephone numbers of family, friends, and other individuals who can provide references, even if they do not live in the area. Persons who can vouch for the client's character, work history, and length of residence are very useful at bail and sentencing hearings.

3. Backup Contacts [§ 3.23]

a. Backup Address [§ 3.24]

The attorney will want to obtain a backup address for the client—for example, the address of the client's mother, father, ex-spouse, or children.

b. Backup Telephone Number [§ 3.25]

Also useful is a backup telephone number where the attorney can reach the client or leave a message for the client.

c. Backup Contact [§ 3.26]

The attorney should ask the client to identify someone who will always know where to find the client. Family members are generally better long-term contacts than friends. Parents are often the most reliable contacts, because they generally know where their children are, no matter what the children's ages.

C. Prior Record and Bail or Bond Information [§ 3.27]

1. Prior Record [§ 3.28]

a. Juvenile [§ 3.29]

The attorney must determine whether the client has a juvenile record. If the client does have a record, the client should sign a release allowing the attorney to review the record. *See infra* Form 3.112A (Authorization for Release of Juvenile Court Records); Form 3.112C (Order Releasing Juvenile Court Records). Were there adjudications of delinquency, status offenses, or "contacts"? Did the client have an attorney for all juvenile court proceedings? What was the nature of the allegations or charges? What were the juvenile court dispositions and dates? If the client was placed outside the home or in a residential treatment center or institution, counsel should find out where and for how long. Counsel should also obtain the names of all juvenile probation agents. Did the client successfully complete any juvenile supervision or probation? Have any of the juvenile adjudications been reversed on appeal or expunged?

b. Adult [§ 3.30]

Has the client has been previously convicted of any crimes? If the client has, the attorney should find out the dispositions in those cases (fine, probation, jail, prison, parole, extended supervision, intensive sanctions, or revocation of supervision). The attorney will need to ascertain the dates of any convictions and the jurisdiction or county of the court. Names of defense attorneys and supervising agents may also prove helpful. The defense attorney will need to know the details of the cases, such as the original charges and the nature of any plea bargains. Were there any arrests that did not result in charges? Have any charges been dismissed? Has the client been acquitted of any charges? Has the client been charged as a habitual offender in the past? Have any convictions been reversed on appeal or expunged? If the client has been to prison, where was he or she imprisoned and for what offense(s)?

c. Traffic [§ 3.31]

If the client is charged with a traffic-related crime, the attorney will want to know as much as possible about his or her traffic record. Has the client's driver's license been revoked or suspended? Did the client receive notice of the action? Has the client notified the Department of Transportation (DOT) of address changes? Charges, dispositions, and dates are important. If the client is unaware of the exact nature of a charge, the attorney should find out whether the client has served any jail sentence and, if so, for how long. In traffic cases, the attorney will need to request a copy of the client's traffic record. *See infra* Form 3.113A (Request for Driver Record Abstract).

d. Commitments or Hospitalizations [§ 3.32]

Has the client ever been involuntarily committed to a mental hospital, to another similar institution, or to any substance abuse treatment program or facility and, if so, when, where, and why? The attorney should obtain the names of former attorneys and treating physicians and facts regarding the hospitalization. Has the client had any voluntary hospitalizations? What about outpatient treatment programs? The client should sign a release authorizing the attorney to review any health-care provider's or hospital records. *See infra* Form 3.114A (Authorization for Release of Health-Care and Other Records).

e. Pending Cases [§ 3.33]

Are there any other legal matters pending involving the client? If so, what are the nature of the charges or investigation, the attorneys involved, and the court or hearing dates? Does the client have any unpaid fines, child-support matters, or outstanding warrants?

2. Supervision Status, Detainers [§ 3.34]

a. Charges and Agent [§ 3.35]

Is the client on Department of Corrections (DOC) supervision? If so, what are the charges for which the client is currently on supervision? The attorney will need the DOC agent's name, address, and telephone number. How long has the agent been supervising the client? What are the names of any previous agents? What is the client's relationship with the agent? Has the client been keeping all appointments with the agent? Is the client supposed to be participating in any special treatment or other programs? Has the court extended the client's supervision and, if so, why? Did the court order the client to pay restitution and, if so, has the client done so? Clients are often poor historians for many of these details. The attorney should confirm any information the client provides by consulting with the agent and reviewing the file. The attorney should consider contacting the agent in an attempt to avoid holds or revocation.

b. DOC Hold [§ 3.36]

The attorney will need to determine whether the DOC has placed a hold on the client. The attorney should explain to the client that, if a hold has been placed, the client has no right to be released on bail, but the DOC has a limited time in which to decide whether to proceed with revocation or to release the client. Has the client seen his or her supervising agent? Has the agent said anything about revocation?

c. Sentence [§ 3.37]

What was the length of the original sentence? Was the sentence (1) withheld, or (2) imposed and stayed? When does supervision expire? How much time has the client already served on this sentence? Is the client on supervision for more than one sentence? If so, the attorney needs pertinent information for all sentences.

d. Statement to Agent [§ 3.38]

Has the client given any statement to the agent? The attorney should advise the client not to give any statements to the agent without first consulting the attorney. The attorney must also advise the client of the consequences of refusing to give a statement to the agent. *See Minnesota v. Murphy*, 465 U.S. 420 (1984); *State ex rel. Tate v. Schwarz*, 2002 WI 127, 257 Wis. 2d 40, 654 N.W.2d 438; *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977); Wis. Admin. Code § DOC 328.04(3)(d). The client should sign a release so the attorney can review the agent's file. The attorney should download and utilize Department of Corrections forms DOC-1163 (authorization to release confidential information) and DOC-1163A (authorization to release health-care information).

e. Detainers [§ 3.39]

Have any other jurisdictions lodged, or do they plan to lodge, any detainers against the client?

3. Court History [§ 3.40]

a. Record of Court Appearances [§ 3.41]

Has the client ever missed any scheduled court appearances? If so, were warrants issued? Was the client arrested on the warrant, or was the missed court appearance cleared up before arrest? How many hours, days, weeks, months, or years passed before the warrant was withdrawn or the client was arrested? In what jurisdiction or county was the court located? Was the client ever arrested for nonpayment of court or child-support obligations?

b. Previous Experiences When Released on Bond [§ 3.42]

The attorney should determine whether the client has ever been allowed release on bond, and if so, find out how much bail was set (or whether release was on a signature bond), for which crimes or charges, and where. Did the client make all the scheduled court appearances? Has the client ever been charged with, or convicted of, bail jumping or escape? Has the client ever been arrested for another offense while released on bond? If not, the attorney can use this fact to argue for release. Likewise, if the client has a long record but has never jumped bail, the attorney can use this fact to argue for release on reasonable conditions.

c. Conditions of Release [§ 3.43]

What conditions, restrictions, or limitations is the client willing to accept if released? If the attorney is familiar with conditions ordinarily imposed by the presiding judge, the attorney can discuss these conditions with the client.

d. History with, or Knowledge of, Assigned Judge [§ 3.44]

Because of the limited time in which to exercise the right to substitution of judge, *see infra* Form 5.20A, the attorney must find out whether the client has appeared in front of the judge. If the attorney does not yet know what judge has been assigned, he or she should find out whether the client has strong opinions about any judge who might be assigned.

4. Ties to the Community [§ 3.45]

a. Client's Residence [§ 3.46]

How long has the client lived in the area and state? How long has the client, or the client's family, lived at the client's present address? How long did the client live at any prior addresses?

b. Work [§ 3.47]

How long has the client been employed at his or her present job? What is the client's present wage or salary? Does the client have a job waiting, if he or she is released? How long will the employer keep the client's job open if the client is not released? Is the employer willing to vouch for the client? What is the client's employment history? Have previous jobs been in the same geographic area? Ask the client if he or she has a résumé; and, if so, for a copy of it.

c. Family [§ 3.48]

Does the client's family live in the community or in another jurisdiction? If the family lives in the community, how long has it lived there? Is it a large or extended family? Does the client have strong family ties? Are any family members dependent on the client? *See supra* § 3.21.

d. Religious Affiliation [§ 3.49]

Does the client regularly attend religious services? Has the affiliation been longstanding? Would the pastor, minister, rabbi, or other religious leader be willing to vouch for the client?

e. Financial Ties [§ 3.50]

Does the client have pension, profit-sharing, savings, or checking accounts or some other regular financial institution relationship in the community? If so, the attorney should obtain the financial institution's name and address and the client's account number(s). Is the client entitled to military, unemployment, worker's compensation, Social Security, Wisconsin Works (W2), or medical assistance benefits in the community? If the client is dependent on one of these sources of assistance, the attorney can argue that the client is unlikely to leave the community and thus lose the benefits. Does the client have real or personal property that would be difficult to liquidate or remove if he or she intended to flee? Has the client demonstrated reliability by making regular mortgage or credit payments? Does the client have any personal-injury or other claims pending that would further ensure his or her stay in the community?

f. Physical and Mental Condition [§ 3.51]

Is the client undergoing any medical treatment? Does the client have any medical problems or disabilities that make it less likely that the client would flee if released? Is the client's release from custody necessary for health reasons? Is the client under the care of a physician, psychiatrist, psychologist, or other health-care provider? If so, the attorney should obtain the name and address of the treating professional and have the client sign a release allowing the attorney to review the records. *See infra* Form 3.114A (Authorization for Release of Health-Care and Other Records). Is the client taking any medications? If so, what is (are) the name(s) of the medication(s) and the name and address of each health-care provider prescribing medication? Ask the client which medication is treating which ailment.

5. Miscellaneous [§ 3.52]

a. Education [§ 3.53]

What is the client's level of education? Which school or schools does the client presently attend, if any? What is the client's grade level? What course of study is the client pursuing? Has the client graduated from any schools? Are the schools in this community? The attorney will want information on grades, honors, extracurricular activities, and attendance records.

b. Military Service [§ 3.54]

Has the client been in the military, and if so, in which branch and for how long? What was the highest rank achieved? Did the client receive any special honors, ribbons, or awards? Did the client serve in combat? Was the client honorably discharged, or was the client subject to any court-martial proceedings? If the latter, the attorney will need the details. Which types of benefits, if any, does the client or the client's family receive in connection with the client's military service?

c. Resources Available for Bail [§ 3.55]

How much cash and what other resources does the client have available for bail purposes? The attorney should ask the client for the name, address, and telephone number of anyone who might help with bail or who might cosign a bond. The attorney must explain the consequences of violating conditions of release, especially if someone else posts bail or cosigns.

D. Facts of the Case [§ 3.56]

1. Charges [§ 3.57]

What is the client charged with? What was the client told the charge(s) would be? Who told the client what the charge(s) would be? *The attorney must always refer to the statutes* and must check to see whether the elements of the crime charged fit the known facts. Elements for charged offenses can be readily ascertained by consulting current Wisconsin Jury Instructions, which are available at https://wilawlibrary.gov/jury/ (last visited Aug. 15, 2024).

2. Penalties [§ 3.58]

The attorney should tell the client exactly which potential penalties the client is facing, based on the allegations or the facts as known, indicating both maximum and mandatory minimum penalties as well as potential fines, court costs, and restitution. Clients want to know, and have a right to know, what they are facing. *The attorney must always refer to the statutes*. The attorney should keep in mind that, because of broad prosecutorial discretion and the number of overlapping statutes, a single incident may result in multiple charges. In considering a motion to dismiss the original charge, the attorney should consider whether the alleged facts might support a more serious charge.

3. Client's Version [§ 3.59]

The attorney should ask the client for a chronological summary of all the facts leading to the client's arrest and should have the client repeat it several times. The defense attorney will need as much detail as possible. If the client denies any involvement, counsel should try to find out exactly where the client was at the time of the alleged offense. Who was with the client? What were they doing at the time of the alleged offense? Does the client or anyone the client knows of have social media accounts of the events? *See infra* § 3.105 (discussing social media).

4. Witnesses [§ 3.60]

The attorney should obtain as much information about each witness as possible, noting any facts or events to which a witness can testify. If the client can help locate a witness, the attorney may give the client a written reminder to provide the information, emphasizing how important it is that the client do so as soon as possible. The attorney must consider not only fact and alibi witnesses but also character witnesses. To locate witnesses, the attorney will need to know the following:

1. *Name.* The attorney must obtain each witness's full name, with the correct spelling. If the client cannot spell a name, the attorney should check all possible variant spellings. Are there any aliases, street names, gang names, nicknames, traditional or ethnic names, premarriage names, names from prior marriages, or legal name changes?

2. *Address.* The attorney must obtain each witness's address, including city, state, and ZIP code. If the client is unable to provide a witness's exact address, the client may be able to describe the house and the nearest intersection. The client should tell the attorney as much as possible about the witness. For example, what is the witness's means of support? Does the witness have a job, craft, or trade? What is the witness's place and type of work? Does the witness belong to a union? Does the witness attend a school? What is the name of the school? Where is the school located? Is the witness dependent on W2, Social Security, disability, veterans', or unemployment insurance benefits? What places does the witness frequent? Is the witness a member of a group or a gang? What are the names, addresses, and telephone numbers of relatives and friends of the witness?

3. *Telephone Number.* For each witness, the attorney should ask whether he or she has a landline, cell, or work telephone number. If not, can the client provide the telephone numbers of the witness's friends, relatives, neighbors, or neighborhood establishments?

4. *Age and Date of Birth.* The attorney should try to obtain each witness's date of birth or approximate age. Most agencies cross-reference criminal and other public records by date of birth.

5. *Physical Description.* Counsel should ask the client to describe each witness's height, weight, gender, race, etc. Does the witness have any distinguishing marks, scars, or tattoos? Does the client have access to photographs of the witness? *See infra*

§ 3.105 (discussing social media).

6. *Description of Automobile.* The attorney should have the client describe the witness's automobile. A license number, later obtained, can lead to a wealth of information.

7. *Social Media Accounts.* The attorney should ask whether the client is aware of any information on social media sites that contradicts or calls into doubt the statements of prosecution witnesses. *See infra* § 3.105 (discussing social media).

5. Arrest [§ 3.61]

a. In General [§ 3.62]

The attorney must find out the circumstances of the arrest. The details are important, because they add to the attorney's factual knowledge of the case and its cast of characters. Such details are also important in motion practice. *See infra* Forms 5.44A–.47A.

b. Date, Time, and Place of Arrest [§ 3.63]

Where was the client when arrested? Why was the client there? If the client was at home, where specifically was the client? At the door? In the yard? On the sidewalk? These facts can make a difference if there was no warrant. Why were police officers there? If the police officers entered the client's home before making the arrest, what took place (words and actions) before the entry? The answers to these questions can assist the attorney in determining whether the police had lawful access to the location where the arrest occurred.

c. Arresting Agency [§ 3.64]

Which department or agency made the arrest? Were officers from other agencies also involved? If so, why?

d. Arresting Officers [§ 3.65]

What are the names, badge numbers, or physical descriptions of the arresting officers? Which officer did what during the arrest? Were officers wearing body cameras?

e. Dates and Places of Custody [§ 3.66]

Was the client taken to more than one location? If so, why? Did the client receive medical treatment? Was the client taken from one district station to another or from one agency to another? If so, why? Were any borders or jurisdictional lines crossed? How long did the client stay at each location? What was done to or with the client at each location?

f. Witnesses [§ 3.67]

Persons who were present are potential witnesses to the arrest and the officers' conduct. The attorney should obtain as much information about these witnesses as possible. *See supra* § 3.60. Were any members of the media present?

g. Other Persons Arrested [§ 3.68]

Did the police arrest any others who were with the client? If so, were they arrested on the same or different charges? The attorney should obtain as much information about these witnesses as possible. *See supra* § 3.60.

h. Grounds or Basis for Arrest [§ 3.69]

Did the officers tell the client why he or she was being arrested? Was it a traffic stop? Did the police issue any traffic citation? If it was a *Terry*-type investigative stop, what did the officers say about the reasons for the stop? What did the client say?

Note. A *Terry* stop is a stop-and-frisk based on a reasonable suspicion that the person is committing, is about to commit, or has committed a crime and that the officer or another person is in danger of physical injury. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also* Wis. Stat. §§ 968.24, 968.25.

i. Arrest Warrant [§ 3.70]

Did the officers have an arrest warrant? Did the client see a warrant? Did the officers say anything about a warrant? Did the client know there was a warrant for his or her arrest?

j. Treatment [§ 3.71]

How did the officers behave toward the client? Did the client need or ask for medical treatment after the arrest? Why?

6. Search [§ 3.72]

a. Circumstances of Search [§ 3.73]

The attorney should ask about the circumstances of any search and confiscation of property and should keep in mind the possibility of a motion to suppress evidence. *See infra* Forms 5.44A–.45D.

b. Search Warrant [§ 3.74]

Did the officers have a search warrant? Did they show it to the client? Did the client read it? If so, what did it say? If the search was of a residence, the attorney should ask about the method of entry. Did the police officers knock or ring the doorbell before entering? Did the officers announce their presence before entering? Did anyone invite the police to enter, or did they enter uninvited?

c. Consent to Search [§ 3.75]

Did the officers ask the client to consent to a search of any of these places, either at the time of the arrest or later? Did the client consent? If so, under what circumstances did the client consent? Did anyone else give consent? Did anyone else have the right to give consent? Did the search exceed the scope of the consent given?

d. Results of Search [§ 3.76]

What was taken or discovered during the search? Did the officers take property from the client or from his or her residence, automobile, place of work, or place where the client was arrested? The attorney should question the client regarding ownership, possession, or other issues relating to the client’s reasonable expectation of privacy, to determine whether the client has standing to challenge the search.

e. Witnesses [§ 3.77]

Did anyone witness the search? If so, the attorney should obtain as much information as possible about these witnesses. *See supra* § 3.60. Were any members of the media present?

f. Officers Conducting Search [§ 3.78]

What were the names, badge numbers, or physical descriptions of the police officers? How many officers were present? Were they from one agency or from different agencies? Were officers wearing body cameras?

7. Statements and Interrogation [§ 3.79]

a. Constitutional Rights [§ 3.80]

Did the police advise the client of his or her constitutional rights? The landmark *Miranda* decision requires law enforcement officers to advise in-custody suspects of the rights set forth in this subsection before interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966). Did the officer read the rights from a form or recite them from memory? Did the client understand what the officer said? How did the client respond when told of the rights? Did the police advise the client of (1) the right to remain silent; (2) the right to refrain from self-incrimination and the fact that anything said could be used against him or her; (3) the right to consult a lawyer before making any statement; (4) the right to have a lawyer provided, if the client is unable to afford one, before making any statement; and (5) the right to stop questioning at any time or to answer only those questions he or she wished to answer? Did the client sign any waiver-of-rights forms? If the client waived these rights, what did the police do or say to convince the client to do so?

b. Request for Attorney [§ 3.81]

Did the client ask for a lawyer or indicate that he or she could not afford one? If so, what was the client told about when a lawyer would be provided?

c. Statements and Confessions [§ 3.82]

Did the client say anything to the police or the district attorney? If so, did the client do so before or after the arrest? What did the client say? Why did the client give a statement? Was the statement voluntary? Was the statement written, oral, or both? Did the client sign a statement or acknowledgment of rights? Was the statement recorded (audio or video)? If so, when did the recording start and stop? Was a stenographer present? Did the client make any spontaneous statements or denials, or were the client's statements or denials made in response to questioning? Did the interrogators make any threats or promises? Did they use any coercion or duress? Did they use any trickery or deceit?

d. Interrogation [§ 3.83]

Where was the client interrogated? The attorney should have the client describe the room or location. The attorney will also want to obtain the names of the interrogating officials or their physical descriptions. Was anyone else present? If so, what were their names, addresses, and telephone numbers? Was there more than one interrogation? If so, how many? Did the interrogator inform the client of his or her constitutional rights on each occasion? If the client gave a statement, how much time elapsed between the statement and the interrogation? How much time elapsed between interrogations? What specific questions did the interrogating officials ask the client? (The questions asked may help the attorney evaluate the state's case, or at least determine the areas of special concern to officials.) Did the client try to stop the questioning or indicate that he or she did not want to talk anymore?

e. Evidence Against Client [§ 3.84]

Did the interrogator confront the client with any evidence against the client? Did the interrogator tell the client about any specific items of evidence against the client? Did the interrogator tell the client that anyone, including an accomplice, had implicated the client? Remind the client that police claims regarding evidence might not be true.

f. Lie Detector Tests and Other Procedures [§ 3.85]

Did the police administer a lie detector (polygraph) test? If so, the attorney should obtain the details of the pre-test instructions and interview and what was asked during the examination. Determine whether the police advised the client that he or she had failed the test. Was the test recorded (audio or video)? Was the client hypnotized? Was the client subjected to a voice-stress analysis?

8. Identification [§ 3.86]

a. Procedure [§ 3.87]

How was the client identified? What procedures were used? Did the police use any lineups, photographs, or showups? If so, when and where? If there was a lineup, who else was in the lineup? What were their names, addresses, telephone numbers, and physical descriptions? Did the police ask the client to say anything? Did they ask the other persons in the lineup to say the same things? How was the client dressed? Were the other persons in the lineup dressed similarly? Was the client asked to consent to participation in the lineup? Did the client have the opportunity to contact an attorney before the lineup? Did the client ask for an attorney? Did the lineup take place after the client had been charged? Was charging delayed so the lineup could be conducted? Was the client represented by an attorney at the time of the lineup? Did the client or counsel object to the procedures? Were the participants in the lineup or any photographs presented sequentially or simultaneously to the witness(es)?

b. Witnesses [§ 3.88]

Who viewed the identification procedures? How many people were present? Were they police officers, witnesses, or accomplices?

9. Physical Testing and Sampling [§ 3.89]

a. Tests or Samples [§ 3.90]

Was the client asked to submit anything for physical testing or sampling procedures (e.g., blood, breath, hair, saliva)? What tests were given, where, and by whom? Was anyone else present?

b. Consent, Attorney, Results [§ 3.91]

Was the client asked to sign any consent forms or releases? If so, was the client advised of his or her right to refuse to sign? Was there a court order for the tests? If so, was the client still asked to consent? Did he or she do so? Did the client object to being tested?

Was the client already represented by an attorney? Did the client ask for an attorney at any time?

Did the client learn the test results?

E. Conclusion of the Interview [§ 3.92]

1. Assessment [§ 3.93]

a. The Case [§ 3.94]

The client generally wants to know what will happen next. The attorney should briefly explain the steps in a criminal case in layperson's terms. If the client will be released on bail, the attorney must impress on the client the importance of attending and being on time for all court appearances and of following the bond conditions.

b. Role of the Attorney [§ 3.95]

The attorney should remind the client that the defense lawyer's job is to work for the client. The client has the right to make the important decisions in the case, such as whether to plead guilty or not guilty, have a jury trial, and testify on his or her own behalf. The attorney should explain that he or she advise the client privately regarding different options, but that the attorney will not substitute his or her judgment for the client's regarding which course of action is in the client's best interests.

The attorney should tell the client not to speak up in any court proceeding or meeting without the attorney's approval and should inform the client that, if he or she has questions about what occurs in a court proceeding or a meeting, the client should ask the attorney about it in private.

The attorney should explain that the attorney's job is to achieve the best result humanly and ethically possible for the client, consistent with the client's desires. The attorney must explain that he or she will not lie, cheat, or steal for the client, but that he or she will use every ethical legal device known to win the case for the client. The attorney should follow this statement with a realistic preliminary appraisal of the case based on what he or she knows at this time.

c. Substitution of Judge [§ 3.96]

The attorney should discuss with the client any issues relating to a possible substitution of judge. *See infra* Form 5.20A (Request for Substitution of Judge).

2. Legal Advice [§ 3.97]

a. Law-Enforcement Officers [§ 3.98]

The attorney should warn the client not to talk to law enforcement officers and should instruct the client as follows:

1. The client should reply to all questions by saying that his or her attorney has advised the client not to answer any questions unless counsel is present.

   Note. In general, clients should produce identification when requested by law enforcement. *See Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 188 (2004) (holding that Fourth Amendment allows police to determine identity during investigative stop). *But cf. State v. Griffith*, 2000 WI 72, ¶ 68, 236 Wis. 2d 48, 613 N.W.2d 72 (holding that police may request identification, but person is not required to respond).

2. The client should tell the law enforcement officers that unless the client's lawyer is present, the client will not agree to waive any rights.

3. The client should not discuss any deals or promises with law enforcement officers in the attorney's absence, especially because law enforcement officers do not have the authority to make any binding deals or promises.

4. The client should understand that the client is not required to give law enforcement officers an explanation of his or her conduct.

b. District Attorney [§ 3.99]

The attorney should give the client the same advice regarding the district attorney or prosecutor as with law enforcement officers. Under no circumstances should the client discuss any deals when the lawyer is absent.

c. Supervising Agent [§ 3.100]

If the client is on probation, parole, or extended supervision, the attorney should advise the client not to make any statement to the supervising agent unless the attorney is present. The client should know that, in Wisconsin, a refusal to give an explanation of the client's conduct and whereabouts to a supervising agent may constitute an additional ground for revocation of supervision. *See* Wis. Admin. Code § DOC 328.04(3)(e), (f). Nevertheless, the client may insist that an attorney be present before the client will give the required explanation to the agent. The client's best option may be to refuse to give any statement and to contest the revocation on the ground of denial of counsel, rather than to give a statement that guarantees revocation and that might lead to discovery of admissible evidence in a criminal proceeding against the client.

Note. A statement given to an agent in response to questions prompted by pending or potential charges or accusations of criminal conduct is untrustworthy because it is not voluntary, and therefore it is not admissible at trial—even in rebuttal—

against the defendant. *See Minnesota v. Murphy*, 465 U.S. 420 (1984); *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 20, 257 Wis. 2d 40, 654 N.W.2d 438; *State v. Evans*, 77 Wis. 2d 225, 235–36, 252 N.W.2d 664 (1977).

d. Right to Counsel Under Wis. Stat. § 946.75 [§ 3.101]

The attorney should advise the client of the provisions of Wis. Stat. § 946.75:

> **946.75 Denial of right to counsel.** Whoever, while holding another person in custody and if that person requests a named attorney, denies that other person the right to consult and be advised by an attorney at law at personal expense, whether or not such person is charged with a crime, is guilty of a Class A misdemeanor.

This section makes it a crime to refuse access to counsel. The statute has some limitations, however. The client must request an attorney by name. It is probably not sufficient to ask for “a lawyer,” “my attorney,” or “my public defender.” The attorney should make sure the client knows the attorney’s name and should give the client several of his or her business cards.

> ***Query.*** Wis. Stat. § 946.75 refers to “the right to … be advised by an attorney at law at *personal expense*” (emphasis added). Does this language exclude public defenders and appointed counsel? Is it relevant whether the client is required to reimburse the state or county for attorney fees? With counsel appointed by the SPD, there is a personal-expense requirement—persons are required to pay a fee for counsel. With court-appointed counsel there will be, in all likelihood, a reimbursement order directed at the person receiving counsel. The personal-expense portion of Wis. Stat. § 946.75 should be met with appointed counsel.
>
> There are no reported cases of a police officer or supervising agent being charged under Wis. Stat. § 946.75.

e. Right to Counsel Under Wis. Stat. § 967.06 [§ 3.102]

The client should also be aware of Wis. Stat. § 967.06, which reads in part:

> **967.06 Determination of indigency; appointment of counsel; preparation of the record. (1)** As soon as practicable after a person has been detained or arrested in connection with any offense that is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel.

Wis. Stat. § 967.06(2)(a) provides that a person in custody who wants to be represented by an attorney (and says that he or she is unable to afford one) must be allowed to apply for public defender services immediately.

f. Invocation of Fifth Amendment Right to Counsel [§ 3.103]

To be fully protected from interrogation while in custody—not only on the instant case but also on other unrelated matters—the client must invoke the right to remain silent and the Fifth Amendment right to counsel (as distinguished from the Sixth Amendment right to counsel). *See McNeil v. Wisconsin*, 501 U.S. 171 (1991); *see infra* Form 3.116A. The attorney should have the client sign an invocation and should file it in court at the earliest opportunity.

g. Discussion of Case [§ 3.104]

The attorney should advise the client not to discuss the case with anyone, including—but not limited to—family members, cellmates, accomplices (whether charged or not), and reporters from any media. The client should tell anyone who wants to discuss the case or who has information about the case to contact his or her attorney. The attorney should advise the client not to respond to any accusations.

h. Social Media [§ 3.105]

The attorney should advise the client not to discuss the case on social-networking websites such as Facebook or Twitter. Officers and prosecutors routinely gather information, including written statements and photographs, from these sites. Information potentially harmful to the client is broader than information about the pending case; for example, a post about alcohol or drug use might show a violation of a bond condition. Therefore, the attorney should warn the client that anything posted on this type of site could be used against the client. The attorney should request the client's usernames and, potentially, passwords.

Conversely, postings by (or related to) adverse witnesses may provide helpful impeachment evidence; therefore, the attorney should ask whether the client is aware of any information on social media sites that contradicts or calls into doubt the statements of prosecution witnesses.

i. If Not in Custody [§ 3.106]

If the client is not in custody, he or she should refuse to go anywhere with police officers, prosecutors, supervising agents, co-defendants, or accomplices. If, however, the authorities have an arrest warrant or inform the client that he or she is under arrest, the client should accompany them without resistance. Unless the client has been arrested and is in custody, or is under a court order, he or she may refuse to participate in any lineup, showup, physical testing or sampling, voice, breath, or handwriting test, or any other investigative procedure. The client should not, however, flee from the police or offer any physical resistance. The client should, under any of these circumstances, insist on the right to contact an attorney under Wis. Stat. § 946.75.

j. If in Custody [§ 3.107]

If the client is in custody (and absent a court order), he or she should also (1) refuse to participate in any lineup or to appear in front of any person for identification purposes; (2) refuse to accompany police officers or the prosecutor any place outside the jail, except to court; and (3) object to any bodily physical examination or any physical testing or sampling of any sort. If any of these proceedings take place in spite of the client's objections, the client should observe and remember as many details as possible. Furthermore, the client should repeat his or her objections to the proceedings to every person with whom he or she comes in contact and should ask for, and write down or remember, each person's name. Lastly, the client should not sign any waivers or releases. Throughout, the client should insist on the right to contact an attorney under Wis. Stat. §§ 946.75 and 967.06. *Cf. State v. Wilks*, 121 Wis. 2d 93, 106, 358 N.W.2d 273 (1984) (holding that person lawfully in custody may be required to stand in lineup on an unrelated offense).

k. Search [§ 3.108]

The client should refuse to permit anyone to search his or her home, automobile, or any other place or thing belonging to the client. If the police officers have a search warrant, the client should not offer any physical resistance, but neither should the client consent to the search or volunteer any information. The client should contact his or her attorney immediately. The client should not sign any releases or consent forms.

l. Contact with Attorney [§ 3.109]

The attorney should advise the client to contact him or her as soon as anything at all comes up relating to the case. The attorney should remind the client to inform him or her (and the clerk of court, if released on conditions, Wis. Stat. § 969.10) of any change of address or telephone number.

m. Client's Letter of Representation [§ 3.110]

The attorney should give the client a summary of this advice in letter form on office letterhead and should advise the client to carry the letter with him or her at all times and to display it to any law enforcement officers, district attorneys, or other officials if questioned or arrested. *See infra* Form 3.115A (Client's Letter of Representation).

III. Master Information List [§ 3.111]

Commentary and Instructions for Form 3.111A

Form 3.111A Master Information List (CRM-0012)

As soon as possible after taking a case, the attorney should interview the client to learn as much as possible about his or her background and the facts of the case. Using a standardized form for information gathering helps to ensure that important elements will not be overlooked.

The Master Information List (MIL) is one example of a standardized form designed for criminal cases. The MIL will serve to remind the attorney to obtain the following:

1. Basic data about the client (name, address, Social Security number, employer) and backup contacts;
2. Information about the client's family and ties to the community;
3. The client's prior record (juvenile, adult, traffic, probation, parole, bail);
4. Information about the client's physical and mental condition;
5. Information about the client's education and military service; and
6. The facts of the case (charges, penalties, the client's version, witnesses, arrest, any statements or interrogation).

Circumstances may not permit the attorney to complete the entire MIL during the first interview. If time is short, the attorney should try to obtain the information needed to open the file and begin the case. The balance of the MIL can be completed at a later time.

The Quick Reference Guide to the Initial Interview, *supra* §§ 3.2–.110, is designed to be used in conjunction with the MIL during the client interview. Organized in the same fashion as the MIL, the checklist suggests many ways of acquiring the needed information and thus serves as an annotated MIL.

Distribution

Original: Client file
Copy: None

Notes

Form 3.111A Master Information List (CRM-0012)

Master Information List

Client Information

Personal Information

Name ______________________________

A/K/A(s) ______________________________

Address ______________________ Rent or Own? ______________

City ______________ State ______________ ZIP ________

Telephone No. (   ) ______________________________

Cellphone No. (   ) ______________________________

Email Address ______________________________

Age ______________ Date of Birth ______________

Social Security No. (SSN) ______________________________

Driver's License No. (Include State) ______________________________

County of Citizenship ______________________________

Primary Language ______________________________

Description: Gender ________ Height ________ Weight ________

Complexion ________ Eyes ________ Hair ________ Race ________

Other Distinctive Features:

____

____

Occupation ______________________________

Employer's Name ______________________________

Employer's Address ______________________________

City ______________ State ______________ ZIP ________

Employer’s Telephone No. ( ) ____________________

Employer’s Cellphone No. ( ) ____________________

Employer’s Email Address ____________________

Contact ____________________

Health Insurance ____________________ Subscriber No. ____________________

Family, Friends, and References

Marital Status/Living Arrangements:

____

____

Dependents:

____

____

Family, Friends, and Other References:

____

____

____

____

____

Backup Contacts

Name ____________________

Address ____________________

City ____________________ State ____________________ ZIP ____________________

Telephone No. ( ) ____________________

Cellphone No. ( ) ____________________

Email Address ____________________

Relationship ____________________

Name ____________________

Address ____

City ________________ State ______________ ZIP ________

Telephone No. (   ) ________________________________

Cellphone No. (   ) ________________________________

Email Address ____________________________________

Relationship _____________________________________

Prior Record and Bail/Bond Information

Prior Juvenile Record

Charges	County	Dispositions	Dates

Prior Adult Record

Charges	County	Dispositions	Dates

Prior Traffic Record

Charges	County	Dispositions	Dates

Commitments or Hospitalizations

Reasons	Institutions	Dates

Pending Cases

Charges	Court and Location	Next Date	Attorney

DOC Supervision, Detainers

Type of Supervision: ___ Probation ___ Extended Supervision ___ Parole

Agent’s Name ______________________________

Agent’s Address ______________________________

City ____________ State ____________ ZIP ________

Agent’s Telephone No. (   ) ______________________

Agent’s Cellphone No. (   ) ______________________

Agent’s Email Address ______________________________

DOC Hold Lodged ______________________________

Date Hold Lodged ______________________________

Charge(s) for Which Currently on Probation:

____

____

____

Sentence Length and Whether Imposed and Stayed or Withheld:

____

____

____

Statement to Agent:

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____

Detainers or Warrants from Other Jurisdictions:

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Court History

Record of Court Appearances:

Previous Bail or Bond Experiences:

Bail Jumping:

Violations of Bail/Bond:

Conditions of Bail/Bond:

Ties to the Community

Time in Area ______________________________

Time at Present Address ______________________________

Time at Previous Address ______________________________

Time at Present Job ______________________________

Likely to Lose Job If Not Released? ______________________________

Prior Employment History:

____

____

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Time Client’s Family Has Lived in Area ______________________________

Family Dependent on Client:

____

____

Religious Affiliation ______________________________

Financial Ties:

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Physical and Mental Condition:

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Miscellaneous

Education:

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Military Service:

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Resources Available for Bail:

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Social Media Accounts: ______________________________

Facebook: *[Username and password]* ________________________

Twitter: *[Username and password]* ________________________

Other: *[Username and password]* ________________________

Facts of the Case

The Offense

Charges:

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Penalties:

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Client's Version of the Situation:

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Witnesses

Name ______________________________

Address ______________________________

City ______________ State ______________ ZIP __________

Telephone No. (____) ______________________________

Cellphone No. (____) ______________________________

Email Address ______________________________

Date of Birth ______________ Age ______________

Description: Gender __________ Height __________ Weight __________

Complexion __________ Eyes __________ Hair __________ Race __________

Employer or School ______________________________

Other Information: ______________________________

Name ______________________________

Address ______________________________

City ______________ State ______________ ZIP __________

Telephone No. (____) ______________________________

Cellphone No. (____) ______________________________

Email Address ______________________________

Date of Birth ______________ Age ______________

Description: Gender __________ Height __________ Weight __________

Complexion __________ Eyes __________ Hair __________ Race __________

Employer or School ______________________________

Other Information: ______________________________

Name ______________________________

____

Address ____

City ________________ State ________________ ZIP __________

Telephone No. (   ) ______________________________________

Cellphone No. (   ) ______________________________________

Email Address ______________________________________

Date of Birth ____________________ Age ______________

Description: Gender __________ Height __________ Weight __________

Complexion __________ Eyes __________ Hair __________ Race __________

Employer or School ______________________________________

Other Information: ______________________________________

Arrest

Date, Time, and Place of Arrest:

____

____

Arresting Agency ______________________________

Arresting Officers:

____

____

____

Dates and Places of Custody:

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Witnesses:

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Other Persons Interested:

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Grounds or Basis for Arrest:

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____

Arrest Warrant:

Treatment:

Search

Circumstances of Search:

Results of Search:

Consent of Search:

Search Warrant:

Witnesses::

Officers Conducting Search::

Statements and Interrogation

Constitutional Rights: Did Police Advise Client of

☐ Right to Remain Silent?

☐ Right Not to Incriminate Self?

☐ Right to Consult an Attorney?

☐ Right to Have an Attorney Provided If Unable to Afford?

☐ Right to Stop Questioning or Answer Selectively?

Did Client Sign Waiver Form? ☐ Yes ☐ No

Factors Affecting Voluntariness of Waiver, Statement, or Both:

____

Request for an Attorney:

____

____

____

Interrogation (include statements and actions of police that influenced client’s decision to give statement):

____

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Statements and Confessions:

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Evidence Against Client:

____

____

____

Lie Detector Tests or Other Procedures:

____

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____

Identification

Procedure:

Witnesses:

Physical Testing and Sampling

Tests or Samples:

Consent::

Attorney:

Test Results:

IV. Release of Juvenile Court Records [§ 3.112]

Commentary and Instructions for Forms 3.112A–3.112D

Form 3.112A	Authorization for Release of Juvenile Court Records (CRM-0013)
Form 3.112B	Authorization for Release of Records (CRM-0014)
Form 3.112C	Order Releasing Juvenile Court Records (CRM-0015)
Form 3.112D	Order Releasing Law Enforcement Agency Records (CRM-0016)

Wis. Stat. §§ 48.396 and 938.396 limit access to juvenile court records. Such records include not only records contained in the court file but also records kept by any juvenile probation officer or agent, as well as some Department of Children and Families records. In most cases, a simple release signed by the client is all that is necessary to obtain access to the client's records. *See infra* Forms 3.112A (Authorization for Release of Juvenile Court Records), 3.112B (Authorization for Release of Records). The release can be either on letterhead or in the form of a juvenile court pleading. The attestation of a witness is not required by law but might make the document more readily acceptable. Wis. Stat. §§ 48.396(2)(am) and 938.396(2g)(am) provide that a person 14 years old or older may authorize others to inspect the records of the person's juvenile proceeding. For a detailed discussion of confidentiality of juvenile records, see Milton Childs et al., *Wisconsin Juvenile Law Handbook* ch. 15 (State Bar of Wis. 5th ed. 2022) [hereinafter *Wisconsin Juvenile Law Handbook*].

Although a release usually suffices, Wis. Stat. §§ 48.396 and 938.396 suggest that a court order may be required. *See infra* Forms 3.112C (Order Releasing Juvenile Court Records), 3.112D (Order Releasing Law-Enforcement Agency Records). If an order is required, application may be made ex parte. The juvenile court judge or juvenile court commissioner should sign the order. *Rock Cnty. Dep't of Soc. Servs. v. DeLeu (In the Int. of K.K.C.)*, 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988), *overruled on other grounds by State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174; *State v. Christian*, 142 Wis. 2d 742, 419 N.W.2d 319 (Ct. App. 1987).

Seeking the juvenile court records of persons other than the client is a discovery issue and should be handled in the circuit court by motion. *See infra* Forms 5.36A–.40B and accompanying Commentary and Instructions. After the circuit court has ruled on the motion, the attorney may have to obtain an order from the juvenile court for release of the court records. *See infra* Form 3.112C. Wis. Stat. §§ 48.293 and 938.293 govern discovery in a juvenile court proceeding. For a detailed discussion of this topic, see *Wisconsin Juvenile Law Handbook*, *supra*, ch. 9.

Pursuant to Wis. Stat. § 906.09(1), a witness's adjudications of delinquency are generally admissible to attack the witness's credibility. Thus, the defense attorney should investigate the juvenile records of potential witnesses.

Distribution

Original:	E-file with the juvenile court
Copy:	Client; client file

Notes

Form 3.112A Authorization for Release of Juvenile Court Records (CRM-0023)

(Date)

To: *(Name of Person or Institution)*

Re: *(3.01) (Client's Name)*
DOB: *(3.04) (Client's Date of Birth)*
Juvenile Case No.)
Release of Juvenile Court Records

I authorize *(Attorney's Name)* or any of *(Attorney's Name's)* agents to inspect and copy, in whole or in part, all files, reports, memoranda, witness statements, transcripts, or other documents or records contained in or maintained by the juvenile or children's branch of the circuit court. I make this authorization pursuant to Wis. Stat. §§ 48.396 and 938.396.

/s/
(3.01) (Client's Name)

/s/
Witness

Form 3.112B Authorization for Release of Records (CRM-0014)

(Date)

To: *(Name of Person or Institution)*

Re: *(3.01) (Client's Name)*
DOB: *(3.04) (Client's Date of Birth)*
Juvenile Case No.)
Release of Records

I authorize *(Attorney's Name)* or any of *(Attorney's Name's)* agents to inspect and copy, in whole or in part, all records contained in or maintained by *(Name of Institution or Person)*. I make this authorization pursuant to Wis. Stat. §§ 48.396, 48.78, 938.396, and 938.78.

/s/
(3.01) (Client's Name)

/s/
Witness

Form 3.112C Order Releasing Juvenile Court Records (CRM-0015)

STATE OF WISCONSIN	CIRCUIT COURT CHILDREN'S DIVISION	*(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. *(Juvenile Case No., if known)*

(1.03) ______________________,

Defendant

ORDER RELEASING JUVENILE COURT RECORDS

It is ordered that *(2.01) (Attorney Handling Case)* or any person assisting *(Attorney's Name)* in the representation of *(3.01) (Client's Name)*, DOB *(3.04) (Client's Date of Birth)*, be allowed to inspect and copy, in whole or in part, all files, reports, memoranda, witness statements, transcripts, or other documents or records related to *(Name of Person Whose Records Are Sought)*, DOB *(Date of Birth)*, contained in or maintained by the juvenile or children's branch of the circuit court. This order is entered pursuant to Wis. Stat. §§ 48.396 and 938.396.

Form 3.112D Order Releasing Law Enforcement Agency Records (CRM-0016)

STATE OF WISCONSIN	CIRCUIT COURT CHILDREN'S DIVISION	*(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. *(Criminal Case No.)*

(1.03) ______________________,

Defendant

ORDER RELEASING LAW ENFORCEMENT AGENCY RECORDS

It is ordered that *(2.01) (Attorney Handling Case)* or any person assisting *(Attorney's Name)* in the representation of *(3.01) (Client's Name)*, DOB *(3.04) (Client's Date of Birth)*, be allowed to inspect and copy, in whole or in part, all law enforcement officers' records related to *(Name of Person Whose Records Are Sought)*, DOB *(Date of Birth)*, in the possession of any law enforcement agency including, but not limited to, *(list agencies believed to have pertinent records)*.

This order is entered pursuant to Wis. Stat. §§ 48.396 and 938.396.

V. Request for Driver Record Abstract [§ 3.113]

Commentary and Instructions for Form 3.113A

Form 3.113A Request for Driver Record Abstract (CRM-0017)

Driver's license records are considered public records under Wis. Stat. § 19.35. Access is restricted by the federal Driver's Privacy Protection Act, 18 U.S.C. §§ 2721–2725. *See also* Wis. Stat. § 19.36(1) (incorporating federal law into Public Records Law). The DOT requires that the requester complete a form titled Driver Record Information Request (*infra* Form 3.113A) to obtain records of another person. Box 7 on page 2 of the form attests to the requester's need for the information in connection with a judicial or administrative proceeding. The form requires information about both the requester and the subject(s) of the request. If the subject's 14-digit driver's license number is unknown, the subject's full name and date of birth should suffice to identify the subject.

The driver record abstract contains the following information:

1. The licensee's name, address, and date of birth;
2. The license numbers and expiration dates of all licenses held by the licensee;
3. Any motor-vehicle-related convictions;
4. Any involvement in reportable accidents; and
5. Any motor-vehicle-related departmental or court actions taken against the licensee.

This information is similar to that included in the driver record abstract provided to the district attorney in traffic prosecutions. However, it is not uncommon for the two abstracts to differ. Thus, it is important to review the record with the client.

The fees for obtaining copies of driving records are set forth in Wis. Stat. § 343.24(2) and (2m) and Wis. Admin. Code § Trans 195.09. The DOT charges five dollars per search of a file or individual record. If copies of correspondence or any other documents contained in the client's record are also requested, the cost is an additional $.25 per page. *See* Wis. Admin. Code § Trans 195.09(3). There are additional fees for other records, for certification of records, and for verification of records. Wis. Admin. Code § Trans 195.09(4)–(6). Certified copies cost an additional five dollars per certification. If the cost of the request is five dollars or less, the DOT will bill the requester. For requests exceeding the five-dollar limit, payment must accompany the order unless the requester has established an account with the DOT. All checks should be made payable to the Registration Fee Trust. The fees are waived for SPD staff attorneys and for private SPD-appointed attorneys who obtain those records electronically.

> ***Note.*** For access to certified driving-records requests in SPD cases, private attorneys should contact the SPD's Assigned Counsel Division administration department at (608) 266-0087.

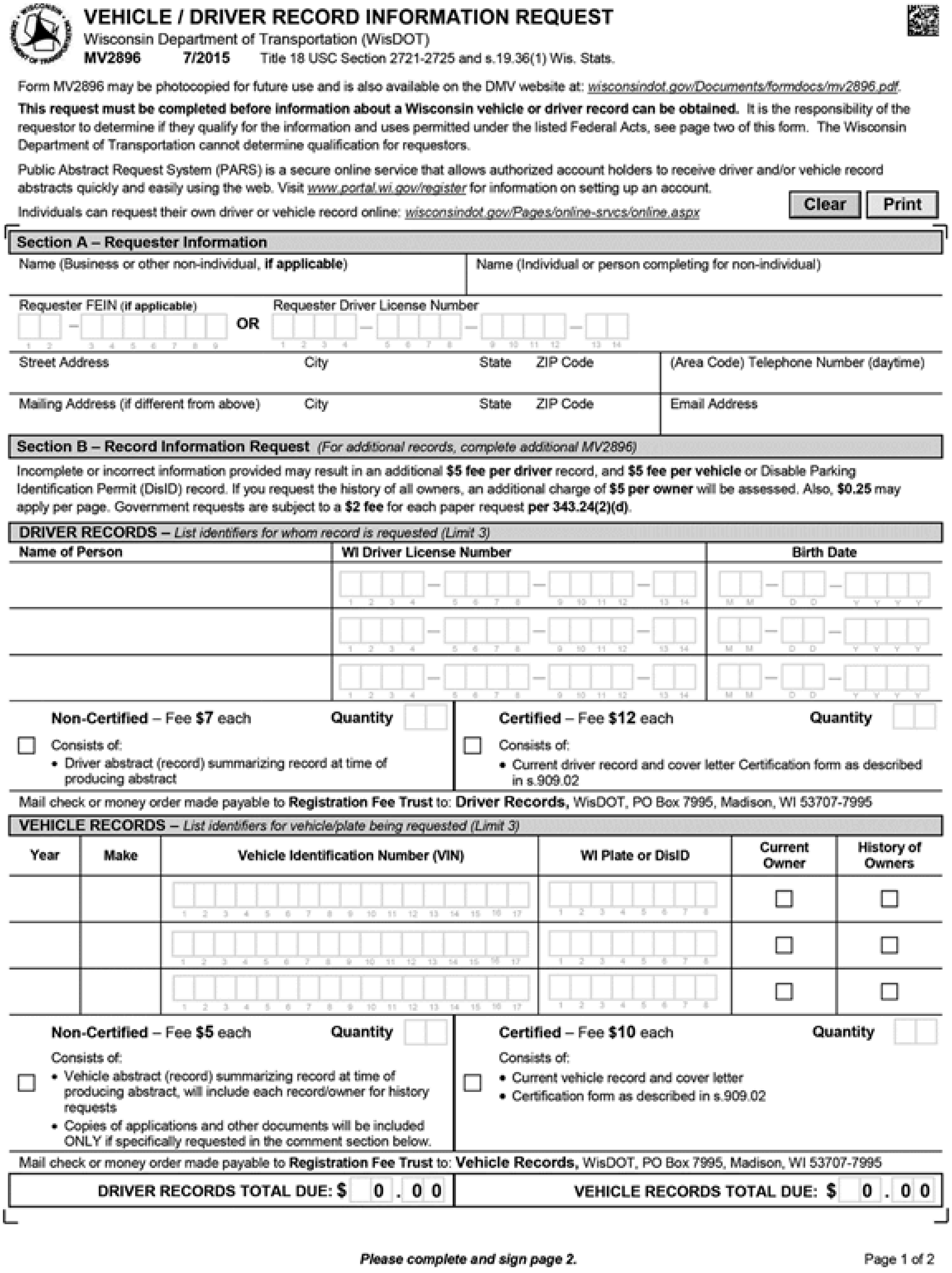
Any person may apply to establish an account with the DOT as a means of obtaining access to records. *See generally* Wis. Admin. Code § Trans. 195.10 (accounts and billing service). Once an account has been established, payment need not accompany requests; rather, the DOT will bill the account owner on a monthly basis. The DOT also provides an online request form for an individual who wishes to obtain a copy of his or her own driving record. *See* DOT, *Purchase Your Own Driving Record*, https://wisconsindot.gov/Pages/online-srvcs/other-servs/request-record.aspx (last visited Oct. 31, 2022).

Distribution

Original:	Department of Transportation
Copy:	Client; client file

Notes

Form 3.113A Request for Driver Record Abstract (CRM-0017)



VEHICLE / DRIVER RECORD INFORMATION REQUEST

Wisconsin Department of Transportation (WisDOT)
MV2896 **7/2015** Title 18 USC Section 2721-2725 and s.19.36(1) Wis. Stats.

Form MV2896 may be photocopied for future use and is also available on the DMV website at: *wisconsindot.gov/Documents/formdocs/mv2896.pdf*.

This request must be completed before information about a Wisconsin vehicle or driver record can be obtained. It is the responsibility of the requestor to determine if they qualify for the information and uses permitted under the listed Federal Acts, see page two of this form. The Wisconsin Department of Transportation cannot determine qualification for requestors.

Public Abstract Request System (PARS) is a secure online service that allows authorized account holders to receive driver and/or vehicle record abstracts quickly and easily using the web. Visit *www.portal.wi.gov/register* for information on setting up an account.

Individuals can request their own driver or vehicle record online: *wisconsindot.gov/Pages/online-srvcs/online.aspx*

Clear **Print**

Section A – Requester Information

Name (Business or other non-individual, **if applicable**)

Name (Individual or person completing for non-individual)

Requester FEIN (**if applicable**) ☐☐ – ☐☐☐☐☐☐☐ **OR** Requester Driver License Number ☐☐☐☐ – ☐☐☐☐ – ☐☐☐☐ – ☐☐

Street Address City State ZIP Code (Area Code) Telephone Number (daytime)

Mailing Address (if different from above) City State ZIP Code Email Address

Section B – Record Information Request *(For additional records, complete additional MV2896)*

Incomplete or incorrect information provided may result in an additional **$5 fee per driver** record, and **$5 fee per vehicle** or Disable Parking Identification Permit (DisID) record. If you request the history of all owners, an additional charge of **$5 per owner** will be assessed. Also, **$0.25** may apply per page. Government requests are subject to a **$2 fee** for each paper request **per 343.24(2)(d)**.

DRIVER RECORDS – *List identifiers for whom record is requested (Limit 3)*

Name of Person	WI Driver License Number	Birth Date
	☐☐☐☐ – ☐☐☐☐ – ☐☐☐☐ – ☐☐	MM – DD – YYYY
	☐☐☐☐ – ☐☐☐☐ – ☐☐☐☐ – ☐☐	MM – DD – YYYY
	☐☐☐☐ – ☐☐☐☐ – ☐☐☐☐ – ☐☐	MM – DD – YYYY

☐ **Non-Certified** – Fee **$7** each **Quantity** ☐☐
Consists of:
- Driver abstract (record) summarizing record at time of producing abstract

☐ **Certified** – Fee **$12** each **Quantity** ☐☐
Consists of:
- Current driver record and cover letter Certification form as described in s.909.02

Mail check or money order made payable to **Registration Fee Trust** to: **Driver Records,** WisDOT, PO Box 7995, Madison, WI 53707-7995

VEHICLE RECORDS – *List identifiers for vehicle/plate being requested (Limit 3)*

Year	Make	Vehicle Identification Number (VIN)	WI Plate or DisID	Current Owner	History of Owners
		☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐	☐☐☐☐☐☐☐☐	☐	☐
		☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐	☐☐☐☐☐☐☐☐	☐	☐
		☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐	☐☐☐☐☐☐☐☐	☐	☐

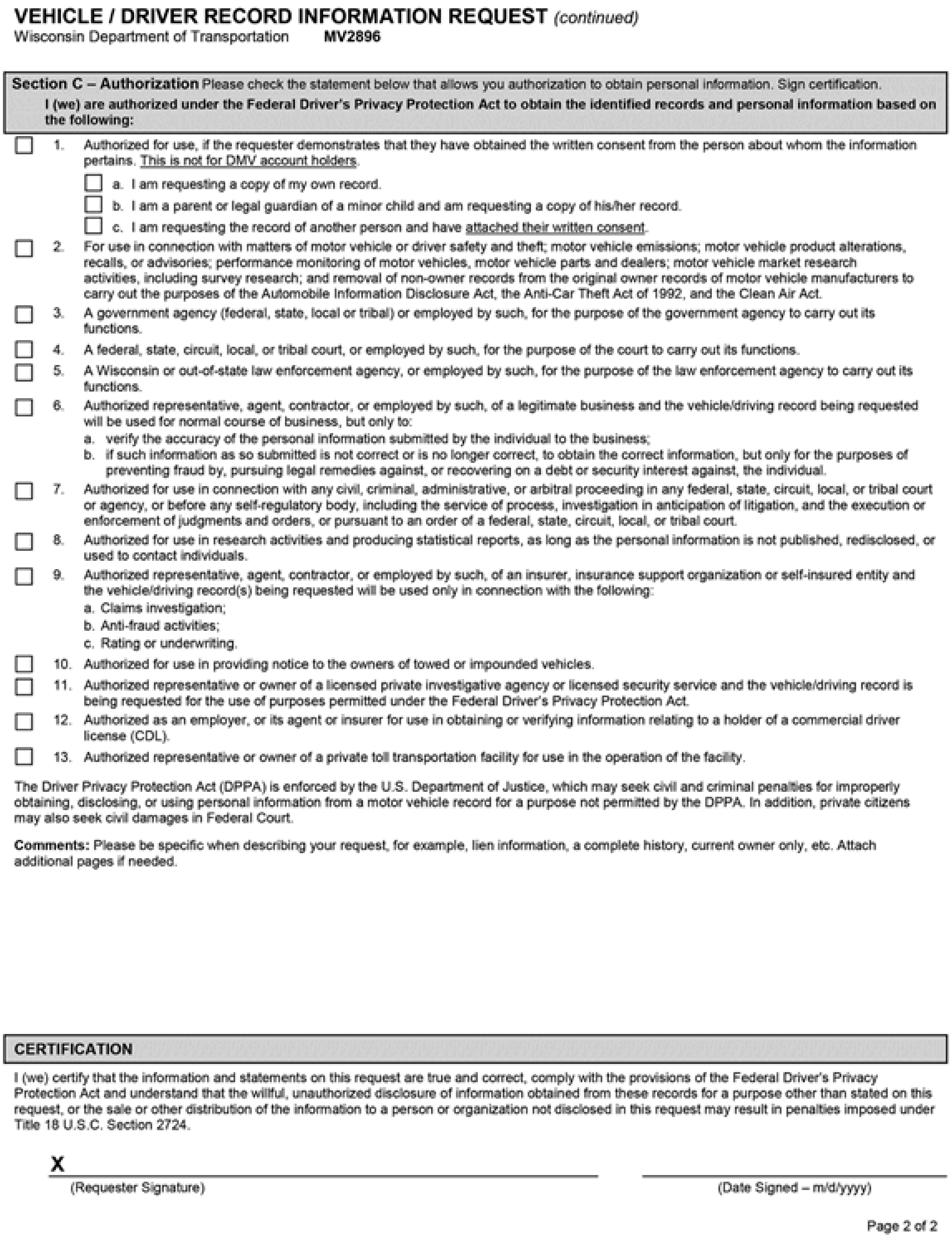
☐ **Non-Certified** – Fee **$5** each **Quantity** ☐☐
Consists of:
- Vehicle abstract (record) summarizing record at time of producing abstract, will include each record/owner for history requests
- Copies of applications and other documents will be included ONLY if specifically requested in the comment section below.

☐ **Certified** – Fee **$10** each **Quantity** ☐☐
Consists of:
- Current vehicle record and cover letter
- Certification form as described in s.909.02

Mail check or money order made payable to **Registration Fee Trust** to: **Vehicle Records,** WisDOT, PO Box 7995, Madison, WI 53707-7995

DRIVER RECORDS TOTAL DUE: $ 0 . 0 0 **VEHICLE RECORDS TOTAL DUE: $** 0 . 0 0

Please complete and sign page 2. Page 1 of 2



VEHICLE / DRIVER RECORD INFORMATION REQUEST *(continued)*

Wisconsin Department of Transportation **MV2896**

Section C – Authorization Please check the statement below that allows you authorization to obtain personal information. Sign certification.

I (we) are authorized under the Federal Driver's Privacy Protection Act to obtain the identified records and personal information based on the following:

☐ 1. Authorized for use, if the requester demonstrates that they have obtained the written consent from the person about whom the information pertains. This is not for DMV account holders.
  - ☐ a. I am requesting a copy of my own record.
  - ☐ b. I am a parent or legal guardian of a minor child and am requesting a copy of his/her record.
  - ☐ c. I am requesting the record of another person and have attached their written consent.

☐ 2. For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of the Automobile Information Disclosure Act, the Anti-Car Theft Act of 1992, and the Clean Air Act.

☐ 3. A government agency (federal, state, local or tribal) or employed by such, for the purpose of the government agency to carry out its functions.

☐ 4. A federal, state, circuit, local, or tribal court, or employed by such, for the purpose of the court to carry out its functions.

☐ 5. A Wisconsin or out-of-state law enforcement agency, or employed by such, for the purpose of the law enforcement agency to carry out its functions.

☐ 6. Authorized representative, agent, contractor, or employed by such, of a legitimate business and the vehicle/driving record being requested will be used for normal course of business, but only to:
  - a. verify the accuracy of the personal information submitted by the individual to the business;
  - b. if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

☐ 7. Authorized for use in connection with any civil, criminal, administrative, or arbitral proceeding in any federal, state, circuit, local, or tribal court or agency, or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a federal, state, circuit, local, or tribal court.

☐ 8. Authorized for use in research activities and producing statistical reports, as long as the personal information is not published, redisclosed, or used to contact individuals.

☐ 9. Authorized representative, agent, contractor, or employed by such, of an insurer, insurance support organization or self-insured entity and the vehicle/driving record(s) being requested will be used only in connection with the following:
  - a. Claims investigation;
  - b. Anti-fraud activities;
  - c. Rating or underwriting.

☐ 10. Authorized for use in providing notice to the owners of towed or impounded vehicles.

☐ 11. Authorized representative or owner of a licensed private investigative agency or licensed security service and the vehicle/driving record is being requested for the use of purposes permitted under the Federal Driver's Privacy Protection Act.

☐ 12. Authorized as an employer, or its agent or insurer for use in obtaining or verifying information relating to a holder of a commercial driver license (CDL).

☐ 13. Authorized representative or owner of a private toll transportation facility for use in the operation of the facility.

The Driver Privacy Protection Act (DPPA) is enforced by the U.S. Department of Justice, which may seek civil and criminal penalties for improperly obtaining, disclosing, or using personal information from a motor vehicle record for a purpose not permitted by the DPPA. In addition, private citizens may also seek civil damages in Federal Court.

Comments: Please be specific when describing your request, for example, lien information, a complete history, current owner only, etc. Attach additional pages if needed.

CERTIFICATION

I (we) certify that the information and statements on this request are true and correct, comply with the provisions of the Federal Driver's Privacy Protection Act and understand that the willful, unauthorized disclosure of information obtained from these records for a purpose other than stated on this request, or the sale or other distribution of the information to a person or organization not disclosed in this request may result in penalties imposed under Title 18 U.S.C. Section 2724.

X ______________________________ (Requester Signature)

______________________________ (Date Signed – m/d/yyyy)

Page 2 of 2

VI. Authorization for Release of Health-Care and Other Records [§ 3.114]

Commentary and Instructions for Form 3.114A

Form 3.114A Authorization for Release of Health-Care and Other Records (CRM-0018)

Wis. Stat. §§ 146.81, 146.82, 146.83, and 804.10(4) govern the release of health-care records in Wisconsin. Wis. Stat. § 610.70 governs requests for disclosure of medical records to insurance companies and requests for disclosure of information by insurance companies. Any person has a right to access his or her own records and a right to copy those records at his or her own expense. Wis. Stat. § 146.83(1). A person may extend access to his or her attorney with an informed consent. *See* Wis. Stat. § 146.82(1).

Informed consent is defined as a written consent including all the following:

1. The name of the patient whose record is being disclosed;
2. The type of information authorized for disclosure;
3. The type(s) of health-care provider(s) authorized to disclose information;
4. The purpose of the disclosure;
5. The individual, agency, or organization to which disclosure may be made;
6. The signature of the patient or other person having authority to allow disclosure and, if signed by an authorized person, the relationship of the person to the patient or the source of that person's authority;
7. The date on which the consent is signed; and
8. The period during which the consent is effective.

Wis. Stat. § 146.81(2).

In the early stages of a criminal case, it is not always easy to decide which records will be required. Therefore, use of a broad authorization such as Form 3.114A, *infra*, may save time and effort later. The form can be shortened, as needed, to serve as a more limited release.

If the client is unable to sign the authorization because of a legal disability, such as a guardianship or minority, Form 3.114A, *infra*, should be changed to indicate who is authorizing the release and the legal basis for that person's authority.

Many agencies, institutions, and health-care providers have their own forms and might insist on their use.

Distribution

Original: Person to whom or institution to which the authorization is directed
Copy: Client; client file

Notes

Form 3.114A Authorization for Release of Health-Care and Other Records (CRM-0018)

(Date)

To: *(Name of Person or Institution)*

Re: *(3.01) (Client's Name)*
DOB: *(3.04) (Client's Date of Birth)*
SSN: *(3.05) (Client's Social Security No.)*
Release of Records

I, *(3.01) (Client's Name)*, authorize and consent to the disclosure to my attorney, *(2.01) (Attorney Handling Case)*, or any person assisting *(Attorney's Name)* of all information relating to me that you have in your possession, including but not limited to the following:

1. Medical records of any kind, including diagnosis, prognosis, or treatment records of hospitals, clinics, physicians, chiropractors, dentists, podiatrists, physical therapists, optometrists, psychologists, psychiatrists, pharmacists, or treatment centers, specifically including (1) records relating to substance abuse treatment, HIV test results, or any AIDS or AIDS-related diagnosis; (2) X-rays; (3) interviews; and (4) history or psychiatric reports;

2. Military records, including records of medical diagnosis and treatment, service history, and disciplinary action, if any;

3. Personal information, including financial or commercial records, business records, or interviews;

4. Employment information, including (1) applications, test scores, polygraph tests, and reports; (2) psychiatric and psychological evaluations; (3) wages or salary; and (4) other personnel information, including that relating to hiring and termination;

5. School records, including grades, reports on conduct and disciplinary matters, multidisciplinary-team (M-team) reports or evaluations, and reports or evaluations by school social workers, psychologists, and psychiatrists;

6. Social service records, including all information, forms, and recorded data in the possession of the Department of *[Workforce Development] [Human Services] [Social Services]* that were obtained by the department as a result of providing any services or any grant of needs-based benefits;

7. Department of Corrections records and files, including but not limited to probation or parole files and records, prison or halfway house records, court or presentence reports, urine or blood test results, or any other documents, letters, memoranda, or notes of any kind; and

8. *(Indicate any special or unusual requests)*

I further authorize and consent to the copying of the above records. I understand that my personal health information and other records disclosed pursuant to the authorization may be redisclosed and may no longer be protected by federal law. My personal health information and other records may be released to any of the following, but not limited to the following: experts, other parties, attorneys involved in my case, and the court hearing my case.

I understand that I may revoke this authorization, in writing, at any time. I understand that my revocation of authorization will not apply to information that has already been released pursuant to this authorization. Unless revoked, this authorization will remain in force until *(specify date ending effective period of consent or three months from the date I sign this authorization)*.

The purpose of this authorization is to assist my attorney in providing me with legal representation.

I give this authorization pursuant to Wis. Stat. §§ 146.81, 146.82, 146.83, and 804.10(4).

I intend that a photocopy of this authorization will be effective as an original.

This authorization is voluntary. I understand that any treatment, payment, enrollment, or eligibility for benefits is not conditioned upon my signing this authorization.

Please send the information requested to:

(2.01) (Attorney Handling Case)
(2.03) (Firm/Office Name)
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Firm/Office Email Address)

Sincerely,

/s/
(3.01) (Client's Name)

/s/
Witness

VII. Client's Letter of Representation [§ 3.115]

Commentary and Instructions for Form 3.115A

Form 3.115A Client's Letter of Representation (CRM-0019)

Form 3.115A, *infra*, summarizes, in letter form, some of the advice suggested in the Quick Reference Guide to the Initial Interview, *supra* §§ 3.2–.110. The client should carry the letter at all times during the attorney's representation. The attorney should instruct the client to display the letter to law enforcement officers, district attorneys, supervising agents, jailors, or anyone else if the client is arrested or questioned during the course of the attorney's representation. The attorney should review the letter with the client and instruct the client to confirm orally the assertions in the letter. The letter should be printed on the official letterhead of the attorney's firm or office and should provide phone numbers where the attorney or an associate can be reached 24 hours per day.

Distribution

Original:	Client
Copy:	Client file

Notes

Form 3.115A Client's Letter of Representation (CRM-0019)

(Date)

Re: *(3.01) (Client's Name)*

TO WHOM IT MAY CONCERN:

I am the attorney for *(3.01) (Client's Name)*. I have given my client the advice contained in this letter, and I demand that you honor it. This letter is a communication from legal counsel, and my client has the right to retain it in *(his/her)* immediate possession at all times. It should not be taken from my client even if *(he/she)* is arrested and jailed.

I have advised my client of the provisions of Wis. Stat. §§ 946.75 and 967.06. These provisions require that any person who is detained or arrested be given immediate access to an attorney upon request. It is a violation of my client's civil rights, and may be a crime, to deny access to an attorney.

I, or an associate, can be reached by phone 24 hours per day, 7 days per week. My client knows this, and if he or she asks to confer with me, you are required by law to allow my client to do so immediately.

I have further advised my client to say nothing at all, under any circumstances, to any law enforcement officer, supervising agent, district attorney, judge, or other official unless my client first has an opportunity to confer with me. I have instructed my client not even to discuss whether *(he/she)* wishes to waive any rights unless I am present. My client will not discuss any deals, plea bargains, or promises unless I am present. My client will not admit, deny, or explain *(his/her)* conduct unless I am present.

I have further advised my client not to discuss *(his/her)* case with anyone, including family members, and particularly not with cellmates, co-defendants, alleged accomplices, or representatives of the media. If anyone wishes to discuss the case or has information about the case, that person should contact me directly.

I have advised my client that, unless under arrest, *(he/she)* is not to go anywhere with police officers, prosecutors, supervising agents, co-defendants, or alleged accomplices.

I have advised my client that, unless ordered by a court, *(he/she)* has the right to refuse to participate in any lineup, showup, physical testing or sampling, voice, breath, or handwriting test, or any other investigative procedure without first consulting with me.

On my advice, my client refuses to consent to any search. If you have a search warrant, my client will not resist your search, but any lack of resistance is not to be construed as consent or lack of objection. Furthermore, my client demands that you limit your search to those places and things specifically described in the warrant.

As the attorney for *(3.01) (Client's Name)*, I demand that you honor my advice to my client. You may feel free to contact me at any time. My office telephone number is printed on this letterhead; after business hours, I, or an associate, can be reached at *(telephone number)*.

Sincerely,

/s/
(2.01) (Attorney Handling Case)

Attorney at Law
(2.07) (Attorney’s Email Address)
State Bar No. *(2.02)*

VIII. Invocation of Fifth Amendment Right to Counsel [§ 3.116]

Commentary and Instructions for Form 3.116A

Form 3.116A Invocation of Fifth Amendment Right to Counsel (CRM-0020)

It is not unusual for a defendant in a criminal case to be the target of other investigations and potential charges. The defense attorney should attempt to protect the client from custodial interrogation regarding both the pending charge and any other potential charges. As discussed below, third parties cannot invoke an individual's right-to-counsel protections.

Asserting the Sixth Amendment right to counsel does not automatically invoke the Fifth Amendment right to counsel. In *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991), the U.S. Supreme Court ruled that because an invocation of the *Sixth* Amendment right to counsel is "offense-specific," it does not protect a defendant from police-initiated custodial questioning regarding uncharged offenses. For discussion of what "uncharged offenses" comprise, see *Texas v. Cobb*, 532 U.S. 162, 172–73 (2001) (holding that "charged offenses," for purposes of invoking right to counsel, are defined by same test applicable to double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Counsel, especially appointed counsel or counsel retained by third parties such as family members, should be aware that unless a *defendant has affirmatively* asserted the defendant's Sixth Amendment right to counsel the police may initiate contact with the defendant to seek a waiver of the right to have an attorney present during custodial interrogation. *Montejo v. Louisiana*, 556 U.S. 778, 792–97 (2009) (holding that defendant who stood mute while judge ordered appointment of counsel did not invoke Sixth Amendment right to counsel); *cf. State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741 (case comprising four separate opinions and leaving uncertain whether the Wisconsin Supreme Court will uphold, in future cases, confessions obtained after the police approach a represented defendant).

When a represented defendant is questioned about new charges, invokes the defendant's Fifth Amendment right to counsel on those charges, and then initiates waiver of that right, the police have no duty to inform the defendant, before resuming custodial interrogation on the new charges, that previously retained counsel has attempted to see the defendant:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right…. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

State v. Stevens, 2012 WI 97, ¶ 61, 343 Wis. 2d 157, 822 N.W.2d 79 (quoting *Moran v. Burbine*, 475 U.S. 412, 422 (1986)).

It is doubtful, but not clearly established, whether the Fifth Amendment right to counsel may be anticipatorily invoked outside the context of custodial questioning. *See McNeil*, 501 U.S. at 182 n.3 ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'…."). Absent an express ruling from the Supreme Court prohibiting such an anticipatory invocation, however, defense counsel should, at the first opportunity, enter into the record an invocation of the client's Fifth Amendment right to counsel. The defendant, not the attorney, should invoke the right. *See State v. Hanson*, 136 Wis. 2d 195, 401 N.W.2d 771 (1987). Form 3.116A, *infra*, is designed for this purpose.

Distribution

Original:	E-file
Copy:	Local law enforcement agencies believed to be investigating the client; client; client file

Notes

Form 3.116A Invocation of Fifth Amendment Right to Counsel (CRM-0020)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S INVOCATION OF RIGHT TO COUNSEL

I, *(3.01) (Client's Name)*, appearing specially and reserving my right to challenge the court's jurisdiction, declare that I do not want to be questioned by any federal or state law enforcement officer or agency or any federal or state prosecutor concerning any pending charges or any other matter without the presence and advice of an attorney. By this declaration, it is my intent to invoke my right to remain silent and my right to counsel guaranteed by U.S. Const. amends. V, VI, XIV and by Wis. Const. art. I, §§ 7, 8. *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Hanson*, 136 Wis. 2d 195, 401 N.W.2d 771 (1987).

Dated: ______________________________

/s/
Defendant

(2.03) (Firm/Office Name)
Attorneys for the Defendant

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

IX. Authorization for Attorney to Appear and Act [§ 3.117]

Commentary and Instructions for Form 3.117A and Form 3.117B

Form 3.117A	Authorization for Attorney to Appear and Act (CRM-0021)
Form 3.117B	Order Approving Defendant's Authorization for Attorney to Appear and Act (CRM-0022)

Wis. Stat. § 971.04(2) allows an attorney for a defendant charged with a misdemeanor to appear and act on an absent client's behalf, with leave of the court. The judge is not required to allow the appearance without the client.

Attorneys should be cautious in using an authorization such as Form 3.117A, *infra*. As a general rule, the client should be present at all appearances. Any appearance under the authority granted by this form should be preceded by a full consultation with the client. Furthermore, the client has a right to be fully advised of the outcome of any appearance by authorization. *See* SCR 20:1.4 (attorney's ethical duty to communicate adequately with client).

> ***Caution.*** One potential problem arises if the attorney has the client complete the authorization before the criminal complaint has been issued: Although the attorney may expect the charge to be a misdemeanor, the district attorney may issue a felony charge, for which the authorization is not effective.

The attorney should include a jurisdictional reservation in every pleading, to preserve jurisdictional objections. *State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975). For further treatment of personal and subject-matter jurisdiction issues, see Forms 5.21A–.34A, *infra*, and accompanying Commentary and Instructions.

Form 3.117B should be prepared and submitted for the court to sign.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 3.117A Authorization for Attorney to Appear and Act (CRM-0021)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AUTHORIZATION FOR ATTORNEY TO APPEAR AND ACT

Pursuant to Wis. Stat. § 971.04(2), I, *(3.01) (Client's Name)*, the defendant in this action, authorize my attorney, *(2.01) (Attorney Handling Case)*, to appear and act on my behalf in any manner and with leave of the court.

By this authorization, I am not waiving my right to raise jurisdictional objections.

Dated: ______________________________

/s/ ______________________________
(3.01) (Client's Name)
(3.06) (Client's Email Address)
(Filer's Email Address if different from Client's)

Form 3.117B Order Approving Defendant's Authorization for Attorney to Appear and Act (CRM-0022)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. *(1.02)*

(1.03) ______________________,

Defendant

ORDER APPROVING DEFENDANT'S AUTHORIZATION
FOR ATTORNEY TO APPEAR AND ACT

Pursuant to Wis. Stat. § 971.04(2), the court approves the request of the defendant, ________, for *(Attorney's Name)* to appear and act on the defendant's behalf.

X. Fee Agreements [§ 3.118]

Commentary and Instructions for Forms 3.118A–3.118C

Form 3.118A	Fee Agreement Letter: Flat Fee Held in Trust (CRM-0023)
Form 3.118B	Legal Representation Agreement: Hourly Fee Held in Trust (CRM-0024)
Form 3.118C	Sample Fee Agreement: Advanced Hourly Fee Not Held in Trust (CRM-0025)

SCR 20:1.5(a) prohibits a lawyer from charging or collecting "an unreasonable fee or an unreasonable amount for expenses." The rule also provides a nonexclusive list of factors relevant to reasonableness. *Id.* These factors include (1) the difficulty of the case, (2) the effect upon the attorney's other employment, (3) the nature of the case, (4) fees generally charged for similar work, and (5) the attorney's skill and experience. *Id.*

Fees must be discussed with the client at the very outset of the case. If it appears that the client will not be able to pay the fees, the attorney should refer the client to the SPD for an eligibility determination. The SPD will appoint counsel for a defendant determined to be eligible under the SPD guidelines. If the defendant is not eligible for SPD assistance, the SPD will provide the defendant with the forms needed to move the court to appoint an attorney at county expense. *See infra* Forms 10.25A–.25D.

For private-pay clients, a written fee agreement is required whenever the total cost (fees and costs) of the representation to the client will likely exceed $1,000. *See* SCR 20:1.5(b)(1). At a minimum, fee agreements must describe the scope of the representation and the basis or rate of the lawyer's fees and list any costs or expenses for which the client will be responsible. *Id.* Payment of fees can present some special problems in criminal cases. Defendants in criminal cases often have limited financial resources. Moreover, the outcome of the case may be a conviction and a prison sentence, despite the lawyer's best efforts. Once a client is in prison, collection of unpaid legal fees is problematic at best.

Often, a family member or another person agrees to pay or guarantee the attorney's fees. When someone else is paying the fees, the lawyer must impress upon all the parties that the lawyer's legal and ethical allegiance is to the client alone. The payor or guarantor will have no voice in managing the case or in making decisions reserved for the client. *See* SCR 20:1.8(f).

The fee agreement must normally be in writing. It can be a formal agreement (*infra* Form 3.118B) or a personal letter written by the attorney and preferably signed by the client and anyone other than the client who either pays or guarantees the fee (*infra* Form 3.118A). For excellent discussions of fee agreements, see Aviva Meridian Kaiser, *Recipe for Effective Engagement Agreements*, Wis. Law., Dec. 2019, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=11&ArticleID=27361; Aviva Meridian Kaiser, *Fee Agreements: Answers to Nagging Questions*, Wis. Law., Oct. 2019, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=9&ArticleID=27255; Timothy J. Pierce, *New Trust Account Rules: Lawyer Fees and Fee Agreements*, Wis. Law., June 2007, at 6; Diane S. Diel & Gerald W. Mowris, *Impact of New Fee and Trust Account Rules on Family and Criminal Law Practitioners*, Wis. Law., July 2007, at 18.

The fee agreement must specify the scope of representation and, to minimize the risk of any misunderstanding or fee dispute, it may also indicate what is not within the scope of the representation. For instance, does the fee cover trial-level proceedings only, or does it include possible postconviction representation? Does representation extend to multiple potential charges, including revocation of Department of Corrections supervision?

SCR 20:1.5(d)(2) specifically prohibits contingent fees in criminal cases or other cases that could result in deprivation of liberty. The most common fee arrangement in criminal cases seems to be the traditional flat fee. Some attorneys do charge on an hourly basis, but this arrangement appears to be the exception rather than the rule. Under a flat-fee arrangement, the attorney and the client agree on the total fee before the attorney undertakes representation. Because all fees for legal services must be earned by providing the agreed-on services, *see* SCR 20:1.0(ag), (dm), SCR 20:1.16(d), advanced payments of any type for future legal services are potentially refundable if the attorney does not provide the services. A flat fee, however, is earned by performing the services agreed on, and thus may be fully earned irrespective of the amount of time or effort expended by the lawyer to perform those services.

The structure of the fee agreement determines whether the attorney must deposit fees in a client trust account. *See* SCR 20:1.15 (safekeeping property; trust accounts and fiduciary accounts). If an attorney receives an advanced fee payment of any type, *see* SCR 20:1.0(ag), the payment is unearned at the time of receipt; therefore, the attorney must deposit the payment in a client trust account, *see* SCR 20:1.15(b)(4), or follow an alternative process set forth in detail in SCR 20:1.15(b)(4m).

> ***Note.*** It is important to distinguish retainers from fees for legal services. *Retainers* are payments made solely to secure the availability of the attorney and cannot be billed against for fees and costs at any time. *See* SCR 20:1.0(mm). Thus, retainers are earned by the attorney simply being available to provide representation, and it may be appropriate to refer to retainers as “nonrefundable.” By contrast, any payment to an attorney for future legal services is, by definition, not a retainer and must be earned by providing the agreed-on services.

Distribution

Original:	Client file
Copy:	Client

Notes

Form 3.118A Fee Agreement Letter: Flat Fee Held in Trust (CRM-0023)

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Note. This letter was drafted by Attorney Stephen P. Hurley of Hurley Burish, S.C., Madison. Reprinted, with slight modifications, by permission of the author. DISCLAIMER: The State Bar of Wisconsin makes no representations or warranties of any kind, express or implied, concerning the legal adequacy or enforceability of the accompanying sample or any part of it. These samples are intended for use only by lawyers admitted to practice in Wisconsin, who are expected to use their own independent legal and business judgment when evaluating the forms for their use. This information should be used as a guide only. You alone are responsible for your contracts.

(Date)

(3.01) (Client's Name)
(3.02) Client's Address)

Re: State v. *(3.01) (Client's Name)*
(1.01) County Case No. *(1.02)*
Charge(s): *(7.01)*

Dear *(Mr./Ms.) (3.01) (Client's Name)*:

You have asked me to represent you in defending the charge(s) currently pending against you in the Circuit Court of *(1.01)* County, Wisconsin. (*If charges have not yet been filed, describe the general nature of the potential charges and/or the incident under investigation.*) The purpose of this letter is to explain the terms of our agreement on payment of the legal fees for this case.

The fee is for the firm of *(2.03) (Firm/Office Name)*. I am the attorney who will be assigned the case and, barring any unforeseen circumstances, I will represent you. In the course of your defense, I will assign tasks to others within the firm. For example, clerks may perform some research, or an associate may draft documents or appear for routine nonsubstantive motions such as a motion for discovery. The fee takes into account a number of factors, including (1) the difficulty of the questions posed by your case; (2) the fact that undertaking your case will preclude me, and possibly others in my firm, from accepting other cases; (3) the results that you hope to achieve; and (4) my experience, reputation, and ability, as well as that of this firm and its attorneys.

You have agreed to pay a flat fee in the amount of $*(indicate amount)*, after which our firm will enter its appearance in your defense.[1] This sum represents the fee for representation through (*insert description of scope of representation, e.g., up to trial, through trial, through postconviction motions*).

In addition to payment of the firm's fees, you will be responsible for payment of certain costs and expenses. You will not be billed for some routine costs such as postage, telephone expenses, photocopying, subpoenas, and witness fees (if travel for witnesses is not extraordinary). You will, however, be billed for costs such as fees for expert witnesses, investigators, polygraph examinations, or psychological evaluations. *[You have agreed to advance the additional sum of* $*(indicate amount) to be used by the firm for such fees.] [Although I cannot rule out the possibility that such services may be needed, I think they are unlikely to be needed based on the facts you have related to me.] [If such services are necessary, you will be billed for them as the fees are incurred.]*

(Add if appropriate)

(Insert name(s)) *(has/have)* agreed to *(pay/guarantee payment of)* your fees and costs. I will therefore deliver to *(him/her/them)* a copy of this letter and request that *(he/she/they)* sign it to indicate *(his/her/their)* understanding of the terms of the fee and *(his/her/their)* agreement to *(pay/guarantee payment of)* your fees and expenses. In making that agreement, *(he/she/they)* must understand that I will represent only you, and that I owe my allegiance only to you. There may be times when *(his/her/their)* interests in the pursuit or resolution of the criminal charges against you differ from yours. In that event, I must follow your direction, not *(his/hers/theirs)*, including any decision about whether, or when, our attorney/client relationship should be terminated. *(He/She/They)* *(is/are)* nonetheless responsible for the obligation that *(he/she/they)* *(has/have)* undertaken to pay your fees and expenses. *(His/Her/Their)* promise to *(pay/guarantee payment)* is an inducement for me, and for this firm, to undertake your representation. *(He/She/They)* must further understand that our relationship is governed by the Wisconsin Rules of Professional Conduct for Attorneys and that our conversations are confidential and privileged; I am not permitted to reveal to any person, including anyone who has agreed to pay your fees, the confidential communications that you make to me in the course of my representation of you. If any refund of advanced fees or costs is due, it will be remitted to *(insert name)*.

(Continue)

I consult with clients about defense strategy and keep them apprised of any developments in the case. Certain decisions that may arise will always be yours to make: (1) whether to accept a grant of immunity or a plea agreement (if one is offered by the state); (2) whether to have a jury trial; and (3) whether to testify at trial. Most other decisions, especially those involving trial strategy, will be made by me. Whenever possible, I will consult with you before making these decisions.

If the terms of this agreement are acceptable to you, please sign both copies of this letter, return one to my office with your fee, and keep the other for your files.

Sincerely,

/s/

(2.01) (Attorney Handling Case)
Attorney at Law

State Bar No. *(2.02)*

I have read the foregoing letter and understand its contents. I request the firm of *(2.03) (Firm/Office Name)* to represent me in the defense of the charges pending against me in *(1.01)* County Circuit Court, Case Number *(1.02)*, according to the terms set forth above. I agree to pay *(2.03) (Firm/Office Name)* a flat fee in the amount of $*(indicate amount)* *(plus an additional amount of $(indicate amount) for fees for experts and/or investigation)*.

Dated: ______________________________

/s/
(3.01) (Client's Name)

(Add if appropriate)

/s/
(Parent/Relative)

Form 3.118B Legal Representation Agreement: Hourly Fee Held in Trust (CRM-0024)

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> ***Note.*** This form originally appeared in Miriam R. Katzman, *Using Written Fee Agreements*, Wis. Law., Dec. 1990, at 12, 15. Reprinted, with slight modifications, by permission of the author and publisher. DISCLAIMER: The State Bar of Wisconsin makes no representations or warranties of any kind, express or implied, concerning the legal adequacy or enforceability of the accompanying sample or any part of it. These samples are intended for use only by lawyers admitted to practice in Wisconsin, who are expected to use their own independent legal and business judgment when evaluating the forms for their use. This information should be used as a guide only. You alone are responsible for your contracts.

I employ the firm of *(2.03) (Firm/Office Name)*, with the understanding that *(2.01) (Attorney Handling Case)* will represent me and provide legal services in Case Number *(1.02)*, currently pending in the Circuit Court of *(1.01)* County on the charge(s) of *(7.01)*. I understand that the law firm may assign other or additional attorneys to represent me, with my approval, as may be required from time to time.

Attorney Fees and Expenses

I agree that the following method is to be used for determining the proper amount of legal fees:

1. **Fees.** The attorney fees for service performed under this agreement will be based on a rate of $*(indicate hourly rate)* per hour. Hourly billing will be to the tenth of an hour. (*If different rates will be charged for other attorneys, for time in court, for travel time, or for paralegals working on the case, specify those rates.*)

2. **Advanced Fee Payment.** To secure the time and services of the attorney for this matter, I agree to make an initial payment in the amount of $*(indicate advanced payment amount)* toward my attorney fees, costs, and expenses.[1] This advanced fee will be a credit against hourly attorney fees, costs, and expenses. It will be refunded after my representation in this matter has been completed, to the extent it has not been used for this purpose.

   I understand that I may be required to pay an additional amount if the amount of work required on my case exceeds the initial payment. I agree to pay an additional amount, when requested by my attorney, sufficient to pay for all legal services performed under this agreement.

3. **Costs and Expenses**.

   A. I authorize my attorney to retain any individual(s) and entity or entities to perform services necessary for investigation or completion of legal services. I agree to pay the fees or charges of every person or entity hired by the attorney to perform necessary services.

   B. I acknowledge that my attorney may incur various expenses in providing services to me. I agree to reimburse the attorney for all out-of-pocket expenses paid. If I am billed directly for these expenses, I agree to make prompt direct payments to the originators of the bills. Such expenses may include, but are not limited to, fees for service and filing; courier or messenger services; recordation and certification of documents, depositions, and transcripts; investigations; witnesses; long-distance telephone calls; photocopying; overtime clerical assistance; travel expenses; postage; notarial attestations; and computer research.

Billing

I agree to the following billing schedule:

1. The attorney will bill me for fees, charges, and expenses on at least a monthly basis as they accrue.

2. I will pay the advanced fee in full upon execution of this agreement. The advanced fee will be a credit against monthly bills.

3. I agree to make payments promptly. I understand that failure to make payments is sufficient reason for the attorney to withdraw from representing me in this matter, whether or not litigation has been commenced. The attorney will notify me in writing before any withdrawal. I agree that a letter to my last known address is sufficient notice.

Consultations

I understand that personal and telephone consultations with my attorney will be part of my representation. I understand that I will be billed by the attorney for the time spent on such consultation.

Discharge of Attorney

I may, if unsatisfied with the services for any reason, discharge the attorney at any time with the permission of the court; however, I understand that I will pay or make arrangements for payment of all fees and costs.

Representation

I understand that the attorney has made no promises, assurances, or guarantees as to the outcome of this case. Payment is not contingent on the outcome of this case.

I have read this fee agreement and have had opportunity to discuss it with my attorney or any other attorney. I understand, agree, and accept all of the terms within this agreement.

Dated: ________________________________

/s/
(3.01) (Client's Name)

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

Form 3.118C Sample Fee Agreement: Hourly Fee Not Held in Trust (CRM-0025)

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Representation and Fee Agreement

1. Anonymous Lawyer, S.C., Attorney at Law (hereinafter "Attorney"), is engaged to represent Anonymous Client (hereinafter "Client") in connection with *(insert description of scope of representation)*. Attorney may retain associate counsel, experts, accountants, or investigators to protect Client’s interests. Fees charged by associate counsel, experts, or investigators retained by Attorney will be treated as expenses to be paid by Client on demand by Attorney. Attorney will consult with client before retaining outside counsel, experts, or investigators.

2. Client agrees to pay Attorney hourly fees at the rate of $____.00 per hour (Attorney’s current hourly rate). Attorney customarily increases hourly rates on an annual basis. Attorney will provide Client with written notice of any increase in Attorney’s hourly rate 30 days before the increase.

3. It is understood that Attorney will bill Client for work that includes, but is not limited to, the following: office conferences, telephone conversations, court appearances, reading and writing correspondence, preparing and reviewing pleadings and documents, analyzing financial records and reports, and travel associated with this representation.

4. Client agrees to pay on demand any actual costs or disbursements incurred or advanced on Client’s behalf, such as fees for travel, mileage, parking, photocopies, telephone calls, process service, court reporters, postage, witnesses and subpoenas, filing and court costs, etc. Mileage will be charged at the rate authorized by the Internal Revenue Service (currently $ ____ per mile).

5. Client agrees to pay $_______.00 on execution of this Agreement as an advanced fee for legal services of Attorney, and $_______.00 as an initial advance against costs to be incurred in this matter. Advanced costs will be placed in Attorney’s trust account and disbursed as costs are actually incurred. Advanced fees will not be placed in Attorney’s trust account. Advanced fees will be placed in Attorney’s business account and the advanced fee sum of $_____ will serve as advanced payments for ___ hours of legal services in this matter. After Attorney has provided ____ hours of legal services for Client, Attorney will provide client with a written accounting of such hours. Attorney is obligated to refund any unearned fees at the conclusion of the representation. Client hereby consents to Attorney placing advanced fees in Attorney’s business account.

At the conclusion of the representation, Attorney will provide Client with a written accounting of all fees and costs incurred in the matter, or an accounting of fees and costs incurred from the date of last billing statement sent to Client, and a refund of any advanced fees that have not been earned or advanced costs that have not been used. If Client disputes Attorney’s determination as to what amount, if any, must be refunded to Client, Client must provide Attorney with written notice of the dispute within 30 days after the date of the final accounting. If the dispute cannot be resolved within 30 days, Attorney will submit the dispute to binding fee arbitration through the State Bar of Wisconsin Fee Arbitration Program. The State Bar's Fee Arbitration Program may be contacted c/o State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158, or by email at feearb@wisbar.org. [Lawyers in Milwaukee County should provide contact information for the Milwaukee Bar Association fee arbitration program, (414) 276-5934.] Client is not required by this agreement to participate in fee arbitration and may pursue a dispute of Attorney's fees in other appropriate forums. Further, if Attorney fails to refund unearned fees, abide by a fee arbitration award, or abide by a final decision of a court with respect to unearned fees, Client may file a claim with the Wisconsin Lawyers Fund for Client Protection to recover such amount. The Wisconsin Lawyers Fund for Client Protection may be contacted c/o State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158 or by email at WLFCP@wisbar.org. Client is hereby notified that Attorney reserves the right to require additional fee and cost advances during the representation.

6. STATEMENTS FOR SERVICES, COSTS, AND DISBURSEMENTS ARE DUE AND PAYABLE WITHIN 20 DAYS AFTER RECEIPT OF STATEMENT FROM ATTORNEY. Client agrees to pay Attorney compensation as the case progresses. Failure to make payments as agreed may provide grounds for Attorney to withdraw from further representation of Client. Fees and costs that are not paid within 20 days will be subject to a 1% monthly (12% yearly) interest charge on any unpaid balances.

7. On conclusion of this legal matter and final billing of Client's account, payment must be made in full within 30 days after receipt of Attorney's Billing Statement.

8. This agreement does not cover or apply to the filing of, prosecution of, or defense of an appeal, in which situation a new representation and fee agreement must be executed.

Dated this _____ day of _______________, 20___, at Hometown, Wisconsin

ANONYMOUS LAWYER, S.C.

______________________ By: ____________________________

Anonymous Client Anonymous Lawyer, Attorney-at-Law

Chapter 4

Analyzing the Case

I. Introduction [§ 4.1]

A. In General [§ 4.2]

A systematic approach to analyzing the criminal case is essential. It is too late to consider evidentiary problems in the middle of a trial. Proper analysis requires a thorough knowledge of the case, based on all available discovery as well as an independent investigation that includes witness interviews. Case analysis is an ongoing process. The defense attorney should begin the investigation early in the case (certainly before the preliminary examination in a felony case) and should continue it after receiving discovery. [1]

Case analysis involves three steps: (1) systematically analyzing the offense(s) charged against the client; (2) building a credible theory of defense; and (3) establishing goals for the case. Form 4.8A, Case Analysis, *infra*, is designed to assist with these three steps.

B. Analysis of Charges [§ 4.3]

The first step in analyzing a criminal case is to break each offense charged into its elements. The *Wisconsin Jury Instructions—Criminal* are an excellent source for the elements of many offenses. Jury instructions are also a good source for some of the pertinent case law. The Wisconsin Jury Instructions are available online via the Wisconsin State Law Library at https://wilawlibrary.gov/jury/ (last visited Sept. 18, 2024).

For each element of the offense, the attorney should determine what the state's case will be and should critique that case, asking questions such as the following:

1. Is the state's evidence sufficient to permit the fact-finder to find that the element was proven?

2. Does the law support the state's theory?

3. Is there a way to contest, or exclude, the state's evidence on this element?

4. Can the defense create an issue on this element?

5. Can the defense rebut, impeach, or discredit the state's evidence in any way?

6. What is the client's version of events? Is there a competing explanation, or evidence not gathered by the state, that would negate an essential element, create a narrative more persuasive than the state's theory, or create reasonable doubt?

During this brainstorming process, the defense attorney should be creative and should write down all ideas that come to mind, no matter how unconventional they might seem. By reviewing the elements and evidence with an open mind, the attorney may come up with ideas, angles, and defenses that he or she did not originally consider. The attorney should be similarly creative in brainstorming potential witnesses or sources of additional evidence, not known to the state, that would support the theory of defense. With the continuing proliferation of technology, there are many new sources of electronic information that could aid a defense (for example, GPS logs from phone apps, video footage from business or home security systems, and social media posts).

It is necessary to analyze each element of every offense charged against the client. This process forces the lawyer to do his or her homework. Analysis of the elements requires that the attorney consider the available defenses, which in turn requires that the attorney research the law.

Finally, the defense attorney should look at the evidence and the elements, to evaluate the case for lesser-included offenses. Depending on the facts of the case, the attorney may choose to argue for or against the inclusion of a lesser offense. For example, if settlement is desired, the attorney may look to lesser-included offenses as the possible basis for a plea agreement. Similarly, if the charge is first-degree intentional homicide and the case goes to trial, the attorney may want the jury to consider lesser-included offenses in its deliberations. On the other hand, if the attorney wants the jury to consider only the issue of guilt or innocence, and not a compromise based on a lesser-included offense, the attorney may not want any lesser-included offense submitted to the jury. Of course, the client should be involved in deciding what approach the defense should take.

C. Theory of Defense [§ 4.4]

A theory of defense in a criminal case is a hypothesis about the way things happened that is consistent with the client's position. A workable theory of defense addresses those facts that are beyond dispute to lead inevitably, by force of logic or emotion, to the conclusion that the defendant is not guilty of the specific charge. There is a defense for every case; the defense attorney's task is to figure out what that theory is.

A theory of defense should generally be a single theory. Multiple theories are often inconsistent and unconvincing (for example, the defense of mistaken identification in a sexual assault case does not combine well with the defense of consent). The preferred tactic is usually to pick the single best defense and frame a strong, consistent narrative around it. The Checklist of Possible Defenses, *infra* § 4.7, may be used as a guide. Many of the listed defenses overlap, and some are colloquial terms for legal defenses. Certain defenses, such as *unconstitutional statute* and *double jeopardy*, should be interposed as a bar to trial. Most of the defenses listed, however, are used at trial.

D. Burden of Proof [§ 4.5]

In preparing a defense, the attorney must analyze not only its substance, but also the applicable burden of proof. For defenses that negate an essential element of the alleged offense (e.g., *alibi*, which negates the element of identity, or *consent*, which negates the element of lack of consent), the state has the burden of proof beyond a reasonable doubt.

The state also bears the burden of proof beyond a reasonable doubt on many affirmative defenses (i.e., defenses that do not negate an element of the alleged offense, but nonetheless can negate guilt). When a defense of privilege, such as *self-defense*, *coercion*, or *necessity*, is raised, the state must disprove it beyond a reasonable doubt. *See* Wis. Stat. § 939.70; *Moes v. State*, 91 Wis. 2d 756, 284 N.W.2d 66 (1979).

By statute, however, the burden of proof for some defenses is on the defendant. *See* Wis. Stat. § 971.15(3) (defendant's burden to prove insanity defense to a reasonable certainty by the greater weight of the credible evidence); *see also* Wis. Stat. § 940.09(2)(a) (defendant's burden to show by a preponderance of the evidence that accident would have occurred despite sobriety and exercise of due care).

E. Goals [§ 4.6]

After analyzing the elements of the offense charged and determining the best theory of defense, the attorney next must set reasonable goals for the case. Goal setting is the last stage, because it requires a thorough knowledge and evaluation of the case. The bottom line is that the client always sets the goals. For example, a client may wish to exercise the right to a trial, despite the attorney's advice on the benefits of settlement; the overall goal must then be to win an acquittal. The attorney must be mindful of the effect of the attorney's evaluation on the client's decisions. In most cases, however, the attorney will find that the client will accept the attorney's evaluation.

The rules for goal setting in a criminal case are as follows:

1. Goals should be written.

2. Goals should be high, but realistic.

3. Goals should be flexible—they should be changed in light of changing circumstances or new evidence.

4. Goals should be broken down into their constituent steps—for example, filing motions, proving facts, retaining experts or investigators, or educating the district attorney or judge about the facts or elements of the defense.

Once goals are set, work should begin immediately to reach those goals.

The following are examples of goals that an attorney and client might set in a criminal case:

1. Negotiate a diversion agreement for dismissal or reduction of charges.

2. Achieve a verdict of acquittal at trial.

3. Suppress a confession or other evidence.

4. Keep the client out of jail or prison.

5. Reduce a felony charge to a misdemeanor.

6. Reduce a misdemeanor charge to a city or county ordinance violation.

II. Checklist of Possible Defenses (CRM-0026) [§ 4.7]

☐ **Accident.** Like *ignorance* or *mistake*, *accident* is generally a defense if it negates a state of mind essential to the crime. *See* Wis. JI—Criminal 772; *State v. Watkins*, 2002 WI 101, ¶¶ 33–41, 255 Wis. 2d 265, 647 N.W.2d 244. It also may be a defense when, in the exercise of a privilege, an unintended result occurs, such as the unintended killing of an innocent third person during a legitimate exercise of self-defense. Wis. JI—Criminal 820 (privilege: self-defense: injury to innocent third party); *see* Wis. Stat. § 939.48(3); *Watkins*, 2002 WI 101, ¶ 45, 255 Wis. 2d 265; *State v. Ambuehl*, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988).

☐ **Alibi.** An *alibi* defense is available when there is evidence that, at the time of the commission of the offense charged, the defendant was at a place other than where the offense occurred. *See* Wis. Stat. § 971.23(8); Wis. JI—Criminal 775; *Logan v. State*, 43 Wis. 2d 128, 168 N.W.2d 171 (1969). At the arraignment or at least 30 days before trial, the defense must give notice to the state of its intent to use an alibi defense. Wis. Stat. § 971.23(8)(a); *see infra* Form 5.42A.

☐ **Amnesia.** The loss of memory can affect a case in at least two possible ways. First, it can be a symptom of a mental disease or defect. Thus, when a client has amnesia, the attorney should consider the issue of competency to stand trial. *See infra Insanity*. However, "[e]pisodic amnesia, the inability to remember committing a crime, is not evidence of mental disease or mental defect." *State v. Leach*, 124 Wis. 2d 648, 667, 370 N.W.2d 240 (1985). Before the issues of competency and nonresponsibility can be meaningfully raised, the defense must investigate the underlying cause of the client's amnesia. Second, even if the amnesia does not render the defendant incompetent, it may cause a due-process issue. "There will be cases … where the fact of amnesia will deny an otherwise competent defendant a fair trial." *See State v. McIntosh*, 137 Wis. 2d 339, 348, 404 N.W.2d 557 (Ct. App. 1987). The full assessment of this issue may not be possible until after trial, *see id.*, although it may be prudent to raise it as soon as possible.

☐ **Coercion or Duress.** *Coercion* or *duress* is a defense if a threat by a person other than the defendant's co-conspirator caused the defendant reasonably to believe that his or her act was the only means of preventing imminent death or great bodily harm to himself or herself or to another. This belief must also have caused the defendant to commit the act(s) in question. If the offense charged is first-degree intentional homicide, however, successful invocation of the defense will reduce the degree of the crime to second-degree intentional homicide rather than providing a complete defense. Wis. Stat. § 939.46; Wis. JI—Criminal 790; *see State v. Brown*, 107 Wis. 2d 44, 318 N.W.2d 370 (1982); *Moes v. State*, 91 Wis. 2d 756, 284 N.W.2d 66 (1979); *State v. Amundson*, 69 Wis. 2d 554, 230 N.W.2d 775 (1975), *overruled on other grounds by State v. Wayerski*, 2019 WI 11, ¶¶ 49, 65, 385 Wis. 2d 344, 922 N.W.2d 468; *State v. Horn*, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987); *see also infra Victim of Human Trafficking*.

☐ **Collateral Estoppel.** *See infra Issue Preclusion*.

☐ **Consent.** Lack of *consent* is an essential element of many crimes. In such crimes, the victim's actual or implied consent can constitute a defense. *See* Wis. Stat. § 939.22(48) (definition of *without consent*); *see also supra Accident*; *infra Mistake*.

☐ **Defense of Others.** A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions, and by the same means, as those under and by which he or she is privileged to defend himself or herself, provided that he or she reasonably believes that the third person would be privileged to act in self-defense and that his or her intervention is necessary to protect the third person. Wis. Stat. § 939.48(4); Wis. JI—Criminal 825, 830; *see State v. Jones*, 147 Wis. 2d 806, 434 N.W.2d 380 (1989); *Ambuehl*, 145 Wis. 2d 343; *see also infra Self-Defense*.

☐ **Defense of Property.** A person is privileged to threaten, or intentionally use, force against another to prevent or terminate what the person reasonably believes to be an unlawful interference with his or her property. Wis. Stat. § 939.49(1). It is not reasonable to use intentional force intended or likely to cause death or great bodily harm for the sole purpose of defending one's property. Only that amount of force necessary to prevent or terminate the interference is allowed. *Id.* This defense may be extended to protection of the property of third persons only if the third person is a member of the actor's immediate family, is a household member, or is a person whose property the actor has a legal duty to protect. Wis. Stat. § 939.49(2); Wis. JI—Criminal 855, 860.

☐ **Double Jeopardy.** This common-law concept is incorporated in both the U.S. and Wisconsin Constitutions. It protects against being prosecuted or tried more than once for the same offense or act. This defense is interposed as a bar to trial. U.S. Const. amend. V; Wis. Const. art. I, § 8; Wis. Stat. §§ 939.71, 939.72; *see infra* Form 5.25A.

☐ **Drugged Condition.** *See infra Involuntary Intoxication, Voluntary Intoxication*.

☐ **Duress.** *See supra Coercion*.

☐ **Entrapment.** This defense is available when a law-enforcement officer has used improper methods to induce a defendant to commit an offense and, by the use of such methods, has succeeded in inducing the defendant to commit an offense that he or she was not otherwise disposed to commit. Wis. JI—Criminal 780; *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969); *State v. Hochman*, 2 Wis. 2d 410, 86 N.W.2d 446 (1957).

☐ **Exclusion (or Suppression) of Evidence.** Pretrial motions may challenge the admissibility of the state's potential evidence. *See* Wis. Stat. § 971.31. Common grounds for exclusion of evidence include unconstitutional search or seizure, *see Mapp v. Ohio*, 367 U.S. 643 (1961), and failure to advise a suspect of the rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). In cases in which the state intends to offer expert testimony, the defense can seek exclusion of that testimony either because the expert lacks sufficient qualifications or because there is an insufficiently reliable scientific basis for the expert's conclusion. Wis. Stat. § 907.02; *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993)*; Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999). The defense also can seek exclusion pursuant to the Wisconsin rules of evidence, Wis. Stat. chs. 901–911. A pretrial order excluding evidence may leave the state without sufficient admissible evidence to proceed.

Practice Tip. Whether to seek exclusion pursuant to the rules of evidence via pretrial motion is a strategic decision. Although knowing in advance which evidence the court will admit allows the defense to prepare accordingly, in some circumstances it might also allow the state time to procure additional, admissible, evidence. If an attorney chooses instead to object to the evidence at trial, it is helpful to write out in advance the specific objections and supporting citations to statute or case law for each piece of evidence.

☐ **Failure of Proof.** *Failure of proof* is available as a defense if counsel can show that the state failed to prove beyond a reasonable doubt that the defendant is guilty, thus failing to overcome the presumption of innocence. Wis. JI—Criminal 140; *see* Wis. Stat. § 939.70.

☐ **Former Jeopardy.** *See supra Double Jeopardy*.

☐ **Ignorance.** *See infra Mistake*.

☐ **Immunity.** No person who is compelled to testify or produce evidence may be liable for any forfeiture or penalty for or on account of testifying or producing evidence. This immunity is subject to the restrictions under Wis. Stat. § 972.085. Wis. Stat. § 972.08; *see Peters v. State*, 70 Wis. 2d 22, 233 N.W.2d 420 (1975); *Hebel v. State*, 60 Wis. 2d 325, 210 N.W.2d 695 (1973); *Elam v. State*, 50 Wis. 2d 383, 184 N.W.2d 176 (1971); *State v. J.H.S.*, 90 Wis. 2d 613, 280 N.W.2d 356 (Ct. App. 1979).

☐ **Incompetency.** Lack of competency is not technically a defense. It is, however, a bar to prosecution. A person who lacks substantial mental capacity to understand the proceedings or to assist in his or her own defense may not be tried, convicted, or sentenced. Wis. Stat. §§ 971.13, 971.14. A defense attorney must raise the issue if there is reason to doubt the client's competency. *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). The ethical duty to raise competency is a narrow exception to the attorney-client privilege; other communications and perceptions should remain confidential. *State v. Meeks*, 2003 WI 104, ¶ 46, 263 Wis. 2d 794, 666 N.W.2d 859. A client's competency may change while a case is pending, and the defense can raise the issue at any time.

☐ **Infancy.** *Infancy* is defined as minority (the quality, state, or condition of being under legal age). *Infancy, Minority*, Black's Law Dictionary (11th ed. 2019). In Wisconsin, for purposes of prosecuting violations of criminal law, a person under the age of 17 is ordinarily considered a child or a minor. Wis. Stat. § 938.02(1), (10m). The defense of infancy is most often considered when a juvenile is prosecuted as an adult without being waived from juvenile court under Wis. Stat. § 938.18. There are limited circumstances in which a child under age 17 can be charged directly in adult court. *See* Wis. Stat. §§ 938.183, 938.17(1).

☐ **Innocence.** *See supra Failure of Proof.*

☐ **Insanity/Mental Disease or Defect.** A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental disease or defect excluding responsibility is an affirmative defense that the defendant must establish to a reasonable certainty by the greater weight of the credible evidence. Wis. Stat. § 971.15; *see* Wis. JI—Criminal 600–662; *State v. Leach*, 124 Wis. 2d 648, 370 N.W.2d 240 (1985); *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972). As with all plea decisions, the decision whether to enter a plea of not guilty by reason of mental disease or defect belongs to the client, not the attorney. Before pursuing this line of defense, the attorney should first consult experts and become familiar with the particular disease and symptomatology, as set forth in the *Diagnostic and Statistical Manual of Mental Disorders* (Am. Psychiatric Ass'n 5th ed., text rev. 2022) (commonly known as *DSM-V-TR*).

☐ **Involuntary Intoxication/Involuntary Drugged Condition.** *Involuntary intoxication* or *involuntary drugged condition* is a defense if the condition renders the actor incapable of distinguishing between right and wrong with regard to the alleged criminal act at the time the act is committed. Wis. Stat. § 939.42(1); Wis. JI—Criminal 755A; *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976); *see State v. Repp*, 117 Wis. 2d 143, 342 N.W.2d 771 (Ct. App. 1983), *aff'd*, 122 Wis. 2d 246, 362 N.W.2d 415 (1985). Involuntary intoxication also provides a defense when it prevents the state from proving a state of mind necessary for conviction. Wis. Stat. § 939.42(2). Note that an involuntary intoxication defense may be available even if intoxication is caused by prescription medication taken as directed. *See State v. Gardner*, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999).

Practice Tip. The defendant may still raise voluntary intoxication as a defense pursuant to the Due Process Clause and the right to present a defense. Under those provisions, a defendant has the constitutional right to raise facts that negate or mitigate the intent element of a crime.

☐ **Issue Preclusion.** *Issue preclusion* is the phrase presently used in Wisconsin to replace *collateral estoppel*. *State v. Canon*, 2001 WI 11, ¶ 2 n.2, 241 Wis. 2d 164, 622 N.W.2d 270. Issue preclusion is akin to *double jeopardy* and is perhaps incorporated into it. Issue preclusion applies when an issue of ultimate fact has once been actively litigated and determined by a valid and final judgment; the issue may not again be litigated between the same parties in any future lawsuit, unless the defendant consents to severance. *See Currier v. Virginia*, 138 S. Ct. 2144, 2150–51 (2018); *Dowling v. United States*, 493 U.S. 342 (1990); *Ashe v. Swenson*, 397 U.S. 436 (1970); *see, e.g.*, *City of Sheboygan v. Nytsch*, 2006 WI App 191, ¶¶ 11–12, 296 Wis. 2d 73, 722 N.W.2d 626; *see also infra* Form 5.25A.

☐ **Jury Nullification.** Although a jury always has the power to acquit a defendant, there is no legal right to a *jury nullification* argument or instruction. It can be defined as the power of the jury to "nullify" applicable laws by returning a verdict that is contrary to both the facts of the case and the law as applied to those facts. *See* Benton L. Becker, *Jury Nullification: Can a Jury Be Trusted?*, Trial, Oct. 1980, at 41–45. The jury has the power to disregard the judge's instructions and the law in order to find a defendant not guilty even when he or she is technically guilty. Most judges will not instruct the jury on this power or permit the defense to argue the issue directly to the jury. *See* Wis. JI—Criminal 705; *State v. Bjerkaas*, 163 Wis. 2d 949, 472 N.W.2d 615 (Ct. App. 1991). However, a jury will act on its conscience when necessary to satisfy the jurors' innate sense of justice. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381, 2420–27 (1999) (discussing jurors' role as community conscience).

☐ **Justification.** *See infra Privilege*.

☐ **Lack of Intent.** When intent is an element of the crime, *lack of intent* is a defense. *See* Wis. Stat. § 939.23 (criminal intent). The state need not prove that the defendant foresaw or intended specific consequences; the defendant is presumed to intend the natural and probable consequences of his or her actions. *Muller v. State*, 94 Wis. 2d 450, 289 N.W.2d 570 (1980); *see supra Accident*; *infra Mistake*.

☐ **Lack of Knowledge.** *See supra Accident, Lack of Intent; infra Mistake*.

☐ **Lesser-Included Offense.** In criminal cases, the defense may argue that the defendant is not guilty of the crime charged but is guilty of some less serious offense. *See* Wis. Stat. § 939.66; Wis. JI—Criminal 112, 112A, SM-6; *see also State v. Sarabia*, 118 Wis. 2d 655, 348 N.W.2d 527 (1984). The attorney should explain possible lesser-included offenses to the client and discuss whether to request the instruction.

☐ **Mistake.** An honest error, whether of fact or of law other than criminal law, is a defense if it negates the existence of a state of mind essential to the crime. A mistake as to a minor's age, as to the existence or constitutionality of the section under which the actor is prosecuted, or as to the scope or meaning of the terms used in that section is not a defense. Wis. Stat. § 939.43; Wis. JI—Criminal 770; *Flores v. State*, 69 Wis. 2d 509, 230 N.W.2d 637 (1975); *see State v. Davis*, 63 Wis. 2d 75, 216 N.W.2d 31 (1974).

☐ **Mistaken Identification.** The defense of *mistaken identification* requires analyzing whether the procedure used to obtain the eyewitness identification testimony was impermissibly suggestive or unreliable. *See* Wis. Stat. § 175.50; *State v. Roberson*, 2019 WI 102, ¶¶ 34–35, 389 Wis. 2d 190, 935 N.W.2d 813; Wis. JI—Criminal 141; Wis. Dep't of Just., *Model Policy and Procedure for Eyewitness Identification* (2010), https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf; *see also infra* Form 5.46A and accompanying commentary and instructions.

☐ **Necessity.** This defense is available when the pressure of natural physical forces causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster or imminent death or great bodily harm to the actor or another. *Necessity* is a defense to a prosecution for any crime based on that act; if the prosecution is for first-degree intentional homicide, however, successful use of the defense will reduce the degree of the crime to second-degree intentional homicide. Wis. Stat. § 939.47; *State v. Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980).

☐ **Posttraumatic Stress Disorder (PTSD).** *PTSD* is a recognized mental disease caused by a psychologically traumatic event that is generally outside the range of usual human experience—for example, the experience of combat. *See Diagnostic and Statistical Manual of Mental Disorders*, *supra*. A PTSD diagnosis may support an argument for a lesser offense, such as imperfect self-defense, or for a finding of not guilty by reason of mental disease or defect. *See also supra Insanity*.

☐ **Privilege.** A person's otherwise criminal conduct may be excused if it fits within a recognized legal privilege (e.g., *supra Coercion*, *Necessity*; *infra Self-Defense*). *See* Wis. Stat. § 939.45.

☐ **Prosecutorial Misconduct.** *Prosecutorial misconduct* can be grounds for a mistrial, and *double jeopardy* may bar retrial under appropriate circumstances. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *State v. Copening*, 100 Wis. 2d 700, 303 N.W.2d 821 (1981); *State v. Harrell*, 85 Wis. 2d 331, 270 N.W.2d 428 (Ct. App. 1978).

☐ **Protection Against Retail Theft.** *See* Wis. Stat. § 939.49; *see also supra Defense of Property*.

☐ **Provocation.** *Provocation* is generally not a defense, but might be thought to be one by a jury. *Adequate provocation*, defined in Wis. Stat. § 939.44(1), is an affirmative defense that reduces first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 939.44(2). Provocation can be a relevant factor in determining whether the defendant acted in *self-defense* or *defense of others*. *See* Wis. Stat. § 939.48; Wis. JI—Criminal 835 (privilege: defense of others: effect of provocation by person defended); *see also supra Jury Nullification*.

☐ **Renunciation/Withdrawal.** Wis. Stat. § 939.05, defining parties to a crime in Wisconsin, allows a person to withdraw from, or renounce, his or her involvement in a crime. *See* Wis. Stat. § 939.05(2)(c). The elements are that the person (1) voluntarily changed his or her mind; (2) no longer desired that the crime be committed; and (3) notified the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime, to allow the others also to withdraw.

Renunciation or *withdrawal* is a defense in conspiracy cases, *see* Wis. JI—Criminal 401, 412, but not in cases in which the defendant is alleged to have actually aided and abetted in the commission of a crime. *See* Wis. JI—Criminal 400; *see also May v. State*, 97 Wis. 2d 175, 293 N.W.2d 478 (1980); *Zelenka v. State*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

☐ **Selective Prosecution.** This defense is based on the Equal Protection Clause of the U.S. Const., amend. XIV; it is a pretrial defense. Selective prosecution is available as a defense when a prosecutor selects one person to prosecute but does not prosecute other persons who may have committed the same crime. An example of selective prosecution is the prosecution of prostitutes but not of their customers. *See Sears v. State*, 94 Wis. 2d 128, 287 N.W.2d 785 (1980); *State v. McCollum*, 159 Wis. 2d 184, 464 N.W.2d 44 (Ct. App. 1990); *see also infra* Form 5.33A.

☐ **Self-Defense.** A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he or she reasonably believes to be an unlawful interference with his or her person by the other. *State v. Head*, 2002 WI 99, ¶ 4, 255 Wis. 2d 194, 648 N.W.2d 413. The actor may intentionally use only such force or threat of force as the actor reasonably believes is necessary to prevent or terminate the interference. Wis. Stat. § 939.48; Wis. JI—Criminal 800, 801, 805, 810, 815, 820, 821; *Head*, 2002 WI 99, ¶ 4, 255 Wis. 2d 194. The privilege of self-defense is presumed reasonable under certain circumstances in a person's dwelling, motor vehicle, or place of business. Wis. Stat. § 939.48(1m).

☐ **Self-Defense, Imperfect.** *Imperfect self-defense* (unnecessary defensive force) is a partial defense to first-degree homicide, reducing the charge to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b); *Head*, 2002 WI 99, ¶ 69, 255 Wis. 2d 194. Imperfect self-defense differs from self-defense in that either the belief that the actor was in imminent danger, or the belief that the force was necessary, is an unreasonable belief. *Head*, 2002 WI 99, ¶ 90, 255 Wis. 2d 194. The actor is entitled to certain presumptions regarding these beliefs when the actor alleges that he or she acted in self-defense in his or her dwelling, motor vehicle, or place of business. Wis. Stat. § 939.48(1m).

☐ **Someone Else Did It.** *See supra Alibi*, *Failure of Proof*, *Mistaken Identity*.

☐ **Speedy Trial, Denial of.** U.S. Const. amend. VI, Wis. Const. art. 1, § 7, and Wis. Stat. § 971.10 provide for a defendant's right to a speedy trial. Violations of the constitutional right must be distinguished from violations of the statutory right. The former require dismissal, but the latter result only in a continuance and the defendant's release from the conditions of bail or, in a misdemeanor case, only in a release from custody. *Barker v. Wingo*, 407 U.S. 514 (1972); *Scarbrough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977); *Hadley v. State*, 66 Wis. 2d 350, 225 N.W.2d 461 (1975); *see State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982); *see also infra* Form 5.52A.

☐ **Statute of Limitation.** Prosecution for most offenses must be commenced within the time specified in the statutes. A statute-of-limitation defense is available if the defense can show that prosecution was commenced after the statutory time limitation expired. *See* Wis. Stat. § 939.74. A related defense, based on the right to due process, exists when the government intentionally causes substantial prejudice to the defendant's fair-trial rights by delaying prosecution. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 789, 795 n.17 (1977); *State v. Blanck*, 2001 WI App 288, ¶¶ 20–22, 249 Wis. 2d 364, 638 N.W.2d 910.

☐ **Suppression.** *See supra Exclusion of Evidence*.

❑ **Unconstitutional Statute.** If the statute under which the defendant is charged is unconstitutional for any reason, then a pretrial motion attacking the statute and asking for dismissal is appropriate. Whenever the constitutionality of a law is challenged, notice must be given to the state attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader. Wis. Stat. § 806.04(11). The defense may attack a statute as unconstitutional if it is overly vague or if it prohibits conduct protected under the U.S. or Wisconsin Constitution (e.g., free speech or the right to bear arms). This constitutional challenge is a pretrial defense. *See State v. Field*, 118 Wis. 2d 269, 347 N.W.2d 365 (1984); *Mack v. State*, 93 Wis. 2d 287, 286 N.W.2d 563 (1980); *see also infra* Form 5.24A. A statute may be unconstitutional in all circumstances (on its face) or unconstitutional as applied to a specific defendant. *See, e.g.*, *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (as-applied challenge to statute prohibiting carrying of a concealed weapon).

❑ **Victim of Human Trafficking.** A victim of the criminal offense of human trafficking can claim an affirmative defense for any offense that was committed as a direct result of the human trafficking. Wis. Stat. § 939.46(1m). An offense is considered a direct result of the human trafficking violation "if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation." *State v. Kizer*, 2022 WI 58, ¶ 15, 403 Wis.2d 142, 976 N.W.2d 356. This affirmative defense constitutes a complete defense to the charged offense, even when the charge is first-degree intentional homicide. *Id.* ¶ 29.

❑ **Voluntary Intoxication/Voluntary Drugged Condition.** Voluntary intoxication or a voluntary drugged condition no longer is a statutory defense even if the condition negates the existence of a state of mind essential to the crime. *See* Wis. Stat. § 939.42.

❑ **Withdrawal.** *See supra Renunciation*.

III. Case Analysis [§ 4.8]

Commentary and Instructions for Form 4.8A

Form 4.8A Case Analysis (CRM-0027)

Form 4.8A is designed to assist the lawyer in the case analysis process. The form is divided into four sections: (1) summary of the charge; (2) analysis of the charge; (3) theory of defense; and (4) goals for the case. The attorney should complete a separate form for each charge in a multiple-charge case.

In analyzing a case, the attorney should always make reference to the statutes, the *Wisconsin Jury Instructions—Criminal*, and the complaint in the case, to determine the elements of the offense(s). Information supplied by the client and materials obtained through the discovery and investigation process will be indispensable in completing this analysis.

Summary of Charge

In this section, the attorney summarizes the allegation and lists the offense charged, the statute under which the charge is brought, and the elements of the offense. In the analysis of the charge, the attorney will analyze the elements enumerated in the summary of the charge.

Analysis of Charge

This section guides the attorney through an analysis of each of the elements of the offense. Note that, on the final page of this section, the element number is left blank so that the page may be photocopied and used for additional elements. The analysis of each element is broken down into three parts: (1) the evidence the prosecution is likely to introduce to prove the element; (2) the law relevant to the prosecution's theory; and (3) issues that could be raised by the defense.

To analyze how the prosecution is likely to prove an element, the attorney should consider the following questions:

- What witnesses will the state call?
- What is the anticipated testimony of the witnesses?
- What items of physical or documentary evidence is the state likely to introduce through the witnesses?
- What foundation is necessary for the evidence?

The law relevant to the prosecution's theory should include the following:

- Case law that either supports or rebuts the prosecution's theory;
- Jury instructions for the element; and
- Any rule of evidence on which the prosecution is relying.

To develop issues that the defense can raise, the attorney should list the following:

- Ideas for countering the prosecution's theory;
- Ideas for the cross-examination of witnesses the prosecution is likely to call to prove the element (e.g., cross-examination of a witness about a prior criminal record, prior inconsistent testimony, or a motive to lie);
- Any potential objections to the testimony or evidence, supported by citations to statutory authority or case law; and
- Any defense witnesses who might rebut or counter the evidence on the element.

Theory of Defense

This section is divided into three parts: (1) the theory of defense; (2) the evidence supporting the theory of defense; and (3) the law supporting and governing the theory of defense.

In laying out the theory of defense, the attorney should identify the theory by name, *see supra* § 4.7 (Checklist of Possible Defenses), and set forth the details of the defense as it applies to the particular case.

The evidence supporting the theory of defense should include the names of witnesses who will testify in support of the theory and a summary of how their testimony will assist the defense. This summary should highlight the key points on which the defense will rely; the summary thus can form the basis for the opening and closing statements by the defense.

The law supporting and governing the theory of defense should include the statutory authority, case law, and jury instructions on which the defense will rely.

Goals for the Case

This section provides space for the attorney to identify both the main goal in the case and intermediate goals. The main goal might be to reduce a felony charge to a misdemeanor, or to achieve a verdict of acquittal at trial. The client should have the final say in determining the main goal in the case. Intermediate goals might include filing motions, retaining experts, or proving key facts.

Distribution

Original:	Client file
Copy:	None

Notes

Form 4.8A Case Analysis (CRM-0027)

Case Analysis

Client's Name ______________ *(3.01)* ______________

Case No. ________ *(1.02)* ________ Page No. ____________

Summary of Charge

Charge and Statute No. ______________________________

Summary of Allegation ______________________________

____

____

____

____

____

____

Prosecution must prove (list all elements, e.g., cause of death, knowledge, intent, use of force or weapon):

- ☐ Venue
- ☐ Identity of defendant as offender
- ☐ Requisite mental state: ______________________
- ☐ ______________________________________
- ☐ ______________________________________
- ☐ ______________________________________
- ☐ ______________________________________
- ☐ ______________________________________

Client's Name *(3.01)*

Case No. *(1.02)* Page No.

Analysis of Charge

Element No. 1: Venue

The prosecution is likely to prove this element by:

The law relevant to the prosecution's theory is:

The defense can create an issue by:

Client's Name *(3.01)*

Case No. *(1.02)* Page No.

Element No. 2: Identity of Defendant as Offender

The prosecution is likely to prove this element by:

The law relevant to the prosecution's theory is:

The defense can create an issue by:

Client’s Name ______________ *(3.01)* ______________

Case No. ________ *(1.02)* ________ Page No. ______________

Element No. 3: Requisite Mental State

The prosecution is likely to prove this element by:

The law relevant to the prosecution’s theory is:

The defense can create an issue by:

Client's Name ____________ *(3.01)* ____________

Case No. ________ *(1.02)* ________ Page No. ____________

Element No. ____: ____________

The prosecution is likely to prove this element by:

The law relevant to the prosecution's theory is:

The defense can create an issue by:

Client's Name ________________ *(3.01)* ________________

Case No. ________ *(1.02)* ________ Page No. ________________

Theory of Defense

The theory of defense in this case is:

The evidence that supports the theory of defense is:

The law that supports and governs the theory of defense is:

Client’s Name ______________________ *(3.01)* ______________________

Case No. ____________ *(1.02)* ____________ Page No. ____________

Goals for the Case

Main Goal:

Intermediate Goals:

☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________
☐ ______________________

Chapter 5

Bringing Pretrial Motions

I. Introduction [§ 5.1]

Pretrial motion practice is an essential part of effective representation of criminal defendants. *See State v. Harper*, 57 Wis. 2d 543, 556, 205 N.W.2d 1 (1973). Unfortunately, it is often neglected because the defense attorney assumes that the case will be settled or that the motions will be unsuccessful. This assumption is often a serious mistake. Even when the facts and law are overwhelmingly unfavorable, there may be a reasonable argument for a future change in the law. Additional tactical reasons, such as obtaining discovery, may make filing a pretrial motion worth the effort.[1]

Pretrial motions serve purposes other than requesting the relief specified in the motion, including the following:

1. Making a record for appeal, *see infra* ch. 9 (Postconviction Proceedings);
2. Serving as an adjunct to discovery provided by statute;
3. Encouraging the district attorney to settle the case;
4. Assisting the defense attorney to evaluate witnesses, pin down their testimony, and identify inconsistencies;
5. Educating the parties (including the defendant, district attorney, and judge); and
6. Testing the theory of defense, *see supra* ch. 4 (Case Analysis).

This chapter serves as an introduction to pretrial motion practice in criminal cases, not as an exhaustive treatise on the subject. The Quick Reference Guide to Motion Law and Practice, *infra* §§ 5.2–.15, explains the different types of motions and the time limits for filing; summarizes the requirements for the form and content of motions; and offers some general practice tips. The Checklist of Pretrial Motions, *infra* § 5.16, is intended to assist the attorney in determining what motions should be filed. Samples of many of the motions listed in the checklist are included in the chapter, along with supporting affidavits and related documents.

For an in-depth discussion of pretrial motion practice, see Christine M. Wiseman & Michael Tobin, *Wisconsin Practice Series—Criminal Practice & Procedure* ch. 11 (2d ed. 2008 & Supp. 2019).

II. Quick Reference Guide to Motion Law and Practice [§ 5.2]

A. Definition and Purpose of Motions [§ 5.3]

A motion is an application for an order by the court. It serves to frame the issues and to notify the opposing party of the movant's position. *See Hansher v. Kaishian*, 79 Wis. 2d 374, 385, 255 N.W.2d 564 (1977). A motion must be in writing unless the court allows an oral motion. Wis. Stat. § 971.30(2)(a). The motion must "[s]tate with particularity the grounds for the motion and the order or relief sought." Wis. Stat. § 971.30(2)(c); *State v. Caban*, 210 Wis. 2d 597, 606, 563 N.W.2d 501 (1997). An oral motion may be brought during a hearing or trial, Wis. Stat. §§ 802.01(2), 972.11(1); *State v. O'Connell*, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993); this option, however, should be reserved for matters of relatively minor importance or matters that cannot reasonably be anticipated before the hearing in question.

B. Types of Motions [§ 5.4]

1. Evidentiary Motions [§ 5.5]

A motion that requires the production of testimonial or other evidence in support of the requested relief is an *evidentiary motion*. If the facts are not in dispute, the parties may stipulate to the facts needed for the court to make its ruling.

With certain exceptions, the movant has the burden of going forward with the evidence. The movant is often spoken of as being required to establish "a factual basis" or "a prima facie case" for the granting of the motion. Once the movant has met its burden, the burden shifts to the other party to rebut. Therefore, the movant needs to know which witnesses are necessary to meet the burden and needs to ensure their presence by subpoena. For example, for motions to suppress, the burden is on the movant to establish that the arrest or search was accomplished without a warrant. Once the defense has made this showing, the burden then shifts to the prosecution to show that the officers' actions fit within one of the recognized exceptions to the warrant requirement. *State v. Verhagen*, 86 Wis. 2d 262, 272 N.W.2d 105 (Ct. App. 1978). For motions to suppress statements or confessions, the initial burden is on the state. *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

The defendant must be present at all evidentiary hearings. Wis. Stat. § 971.04(1)(d). The court may construe the defendant's failure to appear in a timely manner, if without good cause, as a waiver of the right to be present and to present evidence. *Franklin v. State*, 74 Wis. 2d 717, 723, 247 N.W.2d 721 (1976).

A defendant who testifies at a motion hearing does not subject himself or herself to cross-examination on other issues in the case. Wis. Stat. § 901.04(4). Further, the defendant's testimony at a motion hearing cannot be used at trial except possibly for impeachment. *United States v. Salvucci*, 448 U.S. 83, 93 (1980); *State v. Christel*, 61 Wis. 2d 143, 153, 211 N.W.2d 801 (1973).

2. Nonevidentiary Motions [§ 5.6]

Nonevidentiary motions require only legal arguments. Thus, subject to court approval, the defendant need not be present at nonevidentiary hearings. *See* Wis. Stat. § 971.04(1)(d), (h). It is good practice from a tactical perspective, however, for the client to attend all motion hearings.

C. Form and Content of Motions [§ 5.7]

There are few formal requirements for motions in criminal cases. The attorney should nevertheless be familiar with the general requirements of civil motion practice. Wis. Stat. § 972.11(1) provides that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction."

The rules applicable to captions, signing, and other matters of form for pleadings apply to all motions, except that affidavits in support of a motion need not be separately captioned if served and filed with the motion. Wis. Stat. § 802.01(2)(d).

Electronic filing (e-filing) became mandatory for all cases in Wisconsin in December 2019. All e-filed motions must have a blank 0.5-inch top margin and a blank 2-inch-by-2-inch square in the upper right corner on the first page. Motions should be filed in .pdf format, unless they are proposed orders or other documents that may require editing by a court official, in which case they should be Microsoft Word 2007 or newer (.docx) format. Wisconsin Court System, *Circuit Court eFiling Technical Requirements*, https://www.wicourts.gov/ecourts/efilecircuit/tech.htm (updated Apr. 30, 2024).

In certain situations, such as filing a motion before a criminal complaint is filed, e-filing will be impossible, and the attorney must resort to more traditional methods. Any paper motions must be on paper no larger than 8½ inches by 11 inches. Wis. Stat. § 801.145. If the court has adopted a local rule on fax transmission, or if the court approves its use in a specific case, motions may be filed in this manner. *See* Wis. Stat. § 801.16(2).

Every motion should contain the following four parts:

1. Caption;
2. Body, including jurisdictional reservation;
3. Date line; and

4. Closing.

The caption in every motion must set forth the name of the court, the venue, the title of the action, the file number, and a brief description of the type of order or relief sought (e.g., motion to dismiss, motion to suppress). *See* Wis. Stat. §§ 802.01(2)(d), 802.04(1). If the county where the case is being heard has special branches or divisions (e.g., Milwaukee County's Criminal Division), the name of the branch or division may be included in the caption, but is not necessary unless a local court rule so requires.

> ***Practice Tip.*** Under Wis. Stat. § 971.30(2)(b), all motions must include "a denomination of the party seeking the order or relief." Thus, "Defendant's" should precede "Motion" in the caption.

The designation of the type of motion serves to identify the relief sought. The substance of the motion and not its title, however, determines the nature of the motion and the effect of any order. *Buckley v. Park Bldg. Corp.*, 27 Wis. 2d 425, 431, 134 N.W.2d 666 (1965). For example, the attorney may move for a dismissal, but the court may construe the motion as a motion to suppress evidence.

Every motion should state that the defendant's appearance is a special appearance and that the defendant reserves the right to challenge the court's jurisdiction. *See State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 341, 227 N.W.2d 450 (1975).

A motion must notify the opposing party and the court of the specific issue being raised. *See* Wis. Stat. § 971.30(2)(c); *Caban*, 210 Wis. 2d at 605; *see also infra* § 5.15.

When drafting motions, the defense attorney should strive to specify the grounds for the motion without providing unnecessary discovery or disclosure of legal theories to the district attorney. Motions should be simple, concise, and direct, consistent with the statutory criteria. *See* Wis. Stat. §§ 802.01(2)(d), 802.02(5)(a), 971.30(2)(c). Authorities should be cited whenever available, including statutes, case law, and both the federal and state constitutions. The paragraphs of a motion may be numbered for ease of reference.

The attorney should electronically sign each motion. An electronic signature must consist of the phrase "Electronically signed by" followed by the name of the signatory, where the signature would normally appear. Wis. Stat. § 801.18(12). The signature certifies that the attorney has read the motion and that, to the attorney's best knowledge, information, and belief, the motion is well grounded in fact and law, warranted, and not interposed for delay. The motion must contain the attorney's name, address, state bar number (if any), telephone number, email address, and firm name (if any). Wis. Stat. § 802.05(1).

The date line is probably superfluous, because motions receive a date stamp when filed. Nevertheless, a date line is customary, and is insurance against lost documents or other mistakes by a clerk's office. No special date format is necessary. The traditional format is "Dated at *(city, state)* this *(day)* of *(month)*, *(year)*." A simpler, and preferable, format is "Dated: _____________."

In Wisconsin criminal practice, there is no general requirement that an affidavit be filed in support of a motion. Exceptions to this rule can be found, however, in case law as well as the statutes. When in doubt, the attorney should file a supporting affidavit. In this manual, every attempt has been made to specify those situations in which either statute or case law requires an affidavit. Local circuit court rules may also require motions to be supported by affidavits. The abbreviation *ss.* often appears at the top of the first page of affidavits, but it is not necessary. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 839 (3d ed. 2011).

Copies of all supporting records and papers must be served with the notice of motion (except those previously filed or served) and must be plainly referred to within the motion. Wis. Stat. § 802.01(2)(b).

D. Timing of Motions [§ 5.8]

1. In General [§ 5.9]

The attorney should not file any motions until after deciding whether to file a request for substitution of judge. *See infra* Form 5.20A. By "making any motions to the trial court," the attorney loses the right to file a substitution request. Wis. Stat. § 971.20(4). Although motions ordinarily must be in writing, Wis. Stat. § 971.30(2)(a), oral motions are permissible during a trial or hearing, Wis. Stat. §§ 802.01(2), 972.11(1); *State v. O'Connell*, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993). Therefore, if the attorney is considering the possibility of substitution of judge, he or she should refrain from making any oral requests that the court might characterize as motions.

In misdemeanor cases, motions must be filed within 10 days after the initial appearance unless the court allows a later filing. Wis. Stat. § 971.31(5)(a). In felony cases, motions must be filed within 10 days after the arraignment unless the court allows a later filing. *Id*. The attorney should also always check the local circuit court rules and practice. Counsel may consider contacting the local public defender's office for details on local court procedures. Local court rules are available online at https://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx (last visited Aug. 11, 2024). Despite the statute's mandatory language, some motions, such as motions in limine and motions to compel discovery, are often brought outside the 10-day time limit. If the attorney could not reasonably have been aware of the grounds for the motion within the statutory period, the attorney has a valid reason for filing it later.

Times are computed from the day following the initial appearance or arraignment. *See* Wis. Stat. § 985.09(2). The last day of the period is counted unless it is a Saturday, Sunday, or holiday. *Id*. The court may enlarge any of the time limits for filing motions. Wis. Stat. § 971.31(5). Wis. Stat. § 801.15, a civil procedure statute, provides that when a period of fewer than 11 days is specified, weekends and holidays are excluded from the computation. Because this statute is not directly applicable to criminal cases, the defense attorney should assume that motions are due within 10 calendar days unless an extension of time is granted. If, however, motions are filed shortly after the 10th day, the attorney could argue that the policy of Wis. Stat. § 801.15 is equally logical in a criminal case.

The attorney must make a motion to change the place of trial at the arraignment. If it is made later, the attorney will need to show cause for the delay. Wis. Stat. § 971.22(1).

Wis. Stat. § 971.31(2) states as follows (emphasis added):

> [D]efenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised *before trial* by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

In felony cases, the defense must make any objections based on the insufficiency of the criminal complaint before the preliminary examination or waiver of the preliminary examination, or the objections will be deemed waived. Wis. Stat. § 971.31(5)(c). The defense attorney should not make any motions to suppress evidence or statements or motions seeking discovery at the preliminary examination, however, but should wait until after an information has been filed. Wis. Stat. § 971.31(5)(b).

Motions capable of determination before trial may be made and decided before trial. Wis. Stat. § 971.31(1). Although not altogether clear on this point, the statutes seem to contemplate that motions should generally be decided before, rather than at, trial. *See* Wis. Stat. § 971.31(4). The court should decide all motions outside the jury's presence. *Id.*

The defense need not file a written motion to suppress statements of the defendant unless the defense wishes a hearing on the statements before the date of trial. Wis. Stat. § 971.31(3); *Upchurch v. State*, 64 Wis. 2d 553, 219 N.W.2d 363 (1974). Most trial judges, however, prefer and expect defense attorneys to file pretrial motions to raise this issue.

2. Motion to Transfer to Juvenile Court [§ 5.10]

a. Introduction [§ 5.11]

Whenever the defense attorney represents, in adult court, a client who was under the age of 17 at the time of the alleged offense, the attorney should consider a motion to dismiss or to transfer jurisdiction to juvenile court. The timing of the motion and the standards for the court to follow depend on the age of the child, the nature of the charge(s), and, in some cases, the child's past record.

Practice Tip. Although the legislature prefers the term "juvenile," *see, e.g.*, Wis. Stat. §§ 938.183(1m)(c), 970.032(1), 970.035, the defense attorney is advised to use the term "child," which combines accuracy with a more favorable portrayal of his or her client.

b. Felony Case, Motion After Preliminary Hearing [§ 5.12]

The defense attorney should bring a motion for dismissal of adult-court charges or for transfer of jurisdiction to juvenile court after the preliminary hearing but before a final determination of guilt or innocence. *See* Wis. Stat. §§ 970.032(1), (2), 970.035 (applicable to children who have been waived into adult court for offenses allegedly committed before age 15, pursuant to Wis. Stat. § 938.18).

If the evidence at the preliminary hearing does not establish probable cause to believe that the child has committed a felony under circumstances that justify original jurisdiction in adult court, the court must dismiss the adult-court charges. Wis. Stat. § 970.032(1). The prosecutor may then proceed in juvenile court under Wis. Stat. ch. 938. *Id.* Similarly, the court must dismiss adult charges against a child who was waived into adult court, for an offense allegedly committed before age 15, if the prosecutor fails to establish probable cause to believe that the child committed a felony for which waiver is authorized under Wis. Stat. § 938.18(1)(a) or (b). Wis. Stat. § 970.035. The prosecutor may proceed under Wis. Stat. ch. 938. *Id.*

If the evidence establishes probable cause to believe that the child has committed a felony under circumstances specified in Wis. Stat. § 938.183(1)(a), (am), (ar), (b), or (c), the court will retain jurisdiction unless the defense shows, by a preponderance of the evidence, that

1. The child could not receive adequate treatment in the adult system (if convicted);
2. Transferring jurisdiction to juvenile court would not depreciate the seriousness of the alleged offense; and
3. Adult-court jurisdiction is not necessary as a deterrent to future, similar criminal conduct by the child or by other children.

Wis. Stat. § 970.032(2); *State v. Dominic E.W.*, 218 Wis. 2d 52, 55, 579 N.W.2d 282 (Ct. App. 1998); *State v. Verhagen*, 198 Wis. 2d 177, 185–86, 542 N.W.2d 189 (Ct. App. 1995). When the defense is required to prove these three facts, the motion for transfer of jurisdiction to juvenile court should address each of these three statutory issues. A factor favoring juvenile court jurisdiction is scientific research regarding adolescent brain development. *See State v. Jerrell C.J. (In re Jerrell C.J.)*, 2005 WI 105, ¶ 26 n.6, 283 Wis. 2d 145, 699 N.W.2d 110.

c. Misdemeanor Case, Motion Before Trial [§ 5.13]

A child previously convicted in adult court, either following waiver or following original charging in adult court, may later face misdemeanor charges in adult court. *See* Wis. Stat. § 938.183(1)(b), (c). The defense may bring a motion to transfer jurisdiction to juvenile court in this type of case, pursuant to Wis. Stat. § 971.31(13).

The defense must show either that the child did not commit the violation under the circumstances relied on for adult-court jurisdiction, or that transfer to juvenile court would be appropriate under criteria analogous to the three criteria of Wis. Stat. § 970.032(2), summarized in section 5.12, *supra*. Wis. Stat. § 971.31(13)(a), (b).

d. Motion After Finding of Guilt of Lesser or Joined Offense [§ 5.14]

If the child is not convicted of the most serious offense but is found to have committed a lesser offense or a joined offense, a motion for a juvenile adjudication and disposition is appropriate. The grounds for the motion and its contents depend on the nature of the conviction offense.

If the child is found to have committed a lesser offense (or an offense joined with an offense that mandated adult-court jurisdiction) for which the child could *not* have been either charged originally in adult court or waived from juvenile court to adult court, a juvenile adjudication and disposition are mandatory, without consideration of other factors. Wis. Stat. § 938.183(1m)(c)1.

If the child is found to have committed a lesser or joined offense for which the child *could* have been either charged originally in adult court or waived from juvenile court to adult court, a juvenile adjudication and disposition are mandatory if the child proves, by clear and convincing evidence and in light of the waiver criteria stated in Wis. Stat. § 938.18(5), that adjudging the child delinquent and imposing a juvenile disposition would be in the best interests of both the child and the public. Wis. Stat. § 938.183(1m)(c)2. (applicable to children age 15 or over, who may be waived to adult court under Wis. Stat. § 938.18(1)(a)3.).

E. Practice Considerations [§ 5.15]

As a general rule, the defense should file a written motion even if the court allows oral motions. Written motions ensure an accurate record for the client and protect the attorney from future claims of ineffective representation.

It is essential for the defense to address all key issues specifically. A motion must set forth the alleged facts and legal theories sufficiently to convince the court that a hearing is reasonably likely to establish grounds for granting the motion; otherwise, the court may deny the motion without an evidentiary hearing. *See, e.g.*, *State v. Velez*, 224 Wis. 2d 1, 13, 589 N.W.2d 9 (1999). For example, in *State v. Monsoor*, 56 Wis. 2d 689, 705–06, 203 N.W.2d 20 (1973), the court held that a motion challenging a search incident to an arrest was insufficient to challenge a search conducted at a later time, when the motion did not even mention the specific date of the later search.

The attorney must e-file the motion with the court and provide a copy to the client.

The rules of evidence provide that, in a hearing to determine admissibility of evidence, the circuit court need not apply the rules of evidence as strictly as it would at trial. *See* Wis. Stat. §§ 901.04(1), 911.01(4)(a). Although this construction may be useful in civil cases, it is often detrimental to the defendant in criminal cases. Therefore, at a motion hearing, the defense attorney should be prepared to object to evidence that is inadmissible under the rules of evidence; the court has discretion to exclude such evidence.

The Wisconsin Supreme Court has suggested that an *omnibus hearing*, a single hearing at which all motions are considered, is the most efficient method of hearing motions in a criminal case. *See State v. Brown*, 50 Wis. 2d 565, 574, 185 N.W.2d 323 (1971), *overruled on other grounds by State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990). From a tactical viewpoint, this procedure is not always to the defendant's advantage. Separate hearings on motions may be necessary to prove to the court, the prosecution, and the witnesses that the defense is serious about litigating the case. Separate hearings also keep witnesses separate and thus unable to compare notes. Finally, separate hearings give additional opportunities for creating inconsistent testimony.

The defense should request a ruling on all motions made and not withdrawn. A court's failure to rule on a motion will not necessarily be construed as a denial. *See Stippich v. City of Milwaukee*, 34 Wis. 2d 260, 272, 149 N.W.2d 618 (1967).

Circuit court error in denying a motion may be grounds for an appeal. Although most appellate issues are raised after conviction, *see generally infra* ch. 9, the defense must raise some issues via an interlocutory appeal. *See, e.g.*, Wis. Stat. § 809.50 (procedure for interlocutory appeal); *State v. Webb*, 160 Wis. 2d 622, 631, 467 N.W.2d 108 (1991) (holding that review of preliminary hearing must be sought by interlocutory appeal). The defense attorney should consider moving the circuit court to stay proceedings while pursuing an interlocutory appeal. *See State v. Vairin M.*, 2002 WI 96, ¶ 33, 255 Wis. 2d 137, 647 N.W.2d 208.

III. Checklist of Pretrial Motions (CRM-0028) [§ 5.16]

Note. The following checklist is a selective list of motions and other miscellaneous forms commonly filed before trial in a criminal case. It is not an exhaustive list and cannot substitute for the defense attorney's independent judgment. The range of possible motions is limited only by the attorney's imagination.

Jurisdiction, Authority of Tribunal, and Pleadings

☐ Request for substitution of judge. *Infra* Form 5.20A; Wis. Stat. § 971.20.

☐ Motion to dismiss based on pre-arrest delay. *Infra* Form 5.22A; Wis. Stat. § 971.31(2), (5). (Wis. Stat. § 971.31(2) and (5) authorize pretrial motions generally. For brevity, citations to these subsections are not repeated below.)

☐ Motion to dismiss criminal complaint for lack of probable cause. *Infra* Form 5.23A; Wis. Stat. § 968.01, 968.02.

☐ Motion to dismiss based on unconstitutionality of statute. *Infra* Form 5.24A; Wis. Stat. § 806.04(11); *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785.

☐ Motion to dismiss based on double jeopardy. *Infra* Form 5.25A; Wis. Stat. § 939.71; *State v. Moeck*, 2005 WI 57, 280 Wis. 2d 277, 695 N.W.2d 783.

☐ Motion to dismiss based on false statements in criminal complaint *(Franks-Mann* motion). *Infra* Forms 5.26A–5.26B; *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

☐ Motion to dismiss on grounds of multiplicity. *Infra* Form 5.27A; Wis. Stat. §§ 939.66, 939.71, 939.72; *State v. Nommensen*, 2007 WI App 224, 305 Wis. 2d 695, 741 N.W.2d 481.

☐ Motion to dismiss on grounds of duplicity. *Infra* Form 5.28A; Wis. Stat. §§ 939.71, 939.72.

☐ Motion to strike surplusage or prejudicial material from complaint.

☐ Motion to strike co-defendant's or accomplice's statement from complaint. Wis. Stat. § 908.01(4)(b)5.

☐ Motion to dismiss based on official misconduct (e.g., of police, prosecutor, judge, court personnel).

☐ Motion to dismiss based on untimely preliminary examination. *Infra* Form 5.30A; Wis. Stat. § 970.03(2).

☐ Motion to dismiss based on insufficient preliminary examination. *Infra* Form 5.30B; Wis. Stat. § 970.03(1).

☐ Motion to dismiss based on untimely information. *Infra* Form 5.31A; Wis. Stat. § 971.01(2).

☐ Motion to dismiss based on challenge to form, content, or sufficiency of evidence to support information. *Infra* Form 5.31B; Wis. Stat. §§ 970.03(1), 971.01(1).

☐ Motion to dismiss based on vindictive or retaliatory prosecution. *Infra* Form 5.32A.

☐ Motion to dismiss based on selective or discriminatory prosecution. *Infra* Form 5.33A.

☐ Motion to dismiss based on statute of limitation. *Infra* Form 5.34A; Wis. Stat. §§ 939.74, 946.88(1).

☐ Motion to dismiss based on improper place of trial (insufficient facts alleged to support venue). Wis. Stat. § 971.19.

Bail

☐ Motion for grant or reduction of bail. *Infra* Form 5.50A; Wis. Stat. ch. 969.

☐ Motion for release from obligations of bond. *Infra* Form 5.50B; Wis. Stat. ch. 969.

☐ Property bond. Wis. Stat. ch. 969.

☐ Petition for writ of habeas corpus. *Infra* Forms 9.45A–9.45C; Wis. Stat. chs. 781, 782.

☐ Motion to vacate bail or bond forfeiture. Wis. Stat. § 969.13(2).

Representation of Counsel

☐ Notice of representation of accused.

☐ Notice of retainer.

☐ Motion to allow defendant to participate at trial as co-counsel. *Moore v. State*, 83 Wis. 2d 285, 265 N.W.2d 540 (1978).

☐ Motion to withdraw as counsel for defendant. *Infra* Form 5.57A; *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

☐ Motion and stipulation to substitution of counsel.

Payment of Expenses

☐ Motion for appointment of expert(s). Wis. Stat. §§ 165.79, 971.13–.15.

☐ Motion and brief in support of motion for expert or investigator funding. *Infra* Forms 10.28B–10.28C; Wis. Stat. §§ 165.79, 885.08–.10.

Evidence

☐ Motion to suppress physical evidence seized illegally from motor vehicle. *Infra* Form 5.45A; Wis. Stat. §§ 968.10, 968.11.

☐ Motion to suppress physical evidence seized illegally from premises. *Infra* Form 5.45B; Wis. Stat. §§ 968.10–.37.

☐ Motion to suppress physical evidence seized illegally from person. *Infra* Form 5.45C; Wis. Stat. §§ 968.10, 968.11.

☐ Motion to suppress evidence obtained as result of illegal arrest. *Infra* Form 5.45D.

☐ Motion to suppress identification. *Infra* Form 5.46A; *State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813; *State v. Wolverton*, 193 Wis. 2d 234, 264, 533 N.W2d 167 (1995).

☐ Motion to suppress statements of defendant. *Infra* Form 5.47A; Wis. Stat. § 971.31(3), (4). See also section 5.48, *infra*, about suppressing statements subjected to recording but deleted per 60-day retention policy.

☐ Motion to suppress or dismiss for lost or destroyed evidence and related evidence. *Infra* Form 5.48A; *State v. Greenwold*, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994).

☐ Motions in limine (*see infra*, this checklist).

Prior Convictions

☐ Motion to prohibit consideration of prior conviction. *Infra* Form 5.49A; *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92.

Incompetency and Insanity

☐ Motion for competency examination. *Infra* Form 5.35A; Wis. Stat. §§ 971.13–.14.

☐ Motion for examination of defendant (after plea of not guilty because of mental disease or defect). Wis. Stat. § 971.16.

☐ Motion for private examination and testing.

☐ Motions regarding privileged communications. Wis. Stat. ch. 905.

☐ Motions relating to preliminary jury instructions and juror conduct. Wis. Stat. § 972.10(1).

☐ Motion and brief in support of motion for funds for psychiatrist or psychologist. *Infra* Forms 10.28B–10.28C; Wis. Stat. §§ 885.08–.10.

Motions in Limine

☐ Motion in limine with respect to defendant's prior record. *Infra* Form 5.55A; Wis. Stat. § 906.09.

☐ Motion in limine with respect to *Whitty* evidence (prior crimes or act of same or similar nature). *Infra* Form 5.55A; *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

☐ Motion in limine to exclude use of co-defendant's statement against defendant. *Infra* Form 5.55A; Wis. Stat. §§ 908.01(4)(b)5., 908.02; *Crawford v. Washington*, 541 U.S. 36 (2004).

☐ Motion in limine to exclude prejudicial or inflammatory evidence. *Infra* Form 5.55A; Wis. Stat. § 904.03.

Form, Time, and Place of Trial

☐ Motion for continuance. *Infra* Form 5.51A; Wis. Stat. § 971.10(3).

☐ Demand for speedy trial. *Infra* Form 5.52A; Wis. Stat. § 971.10(4).

☐ Motion for change of venue. *Infra* Form 5.53A; Wis. Stat. §§ 971.19, 971.22, 971.223; *Hoppe v. State*, 74 Wis. 2d 107, 246 N.W.2d 122 (1976).

☐ Motion for change of venire (jury from another county). *Infra* Form 5.53A; Wis. Stat. § 971.225.

☐ Motion to sever defendants. *Infra* Form 5.54A; Wis. Stat. § 971.12.

☐ Motion to sever charges. *Infra* Form 5.54C; Wis. Stat. § 971.12.

Discovery and Inspection

☐ General motion for exculpatory evidence. Wis. Stat. § 971.23(1)(h).

☐ Demand for specific exculpatory evidence. Wis. Stat. § 971.23(1)(h).

☐ Motion for specific exculpatory evidence. Wis. Stat. § 971.23(1)(h).

☐ Motion for information necessary to receive fair trial. Wis. Stat. § 971.23.

☐ Motion for disclosure of impeaching information. Wis. Stat. § 971.23(1)(h).

☐ Motion to require state to reveal any agreement entered into by state or any of its agents and any prosecution witness, co-defendant, or alleged accomplice. Wis. Stat. § 971.23(1)(h).

☐ Motion to compel state to reveal name and address of material witness. Wis. Stat. § 971.23(1)(d), (h).
☐ Demand for discovery and inspection. *Infra* Form 5.36A; Wis. Stat. § 971.23(1).

☐ Motion for discovery and inspection. *Infra* Form 5.36B; Wis. Stat. § 971.23.

☐ Motion to compel disclosure. Wis. Stat. § 971.23.

☐ Motion for disclosure of electronic or other surveillance. Wis. Stat. § 968.30(7)–(9).

☐ Motion for in camera inspection of potentially exculpatory evidence. *Infra* Form 5.37A; Wis. Stat. § 971.23(6m).

☐ Defendant's response to state's demand for discovery. *Infra* Forms 5.40A, 5.40B; Wis. Stat. § 971.23(2m).

☐ Motion for testing by State Crime Laboratory. *Infra* Form 5.39A; Wis. Stat. § 165.79.

☐ Motion to compel disclosure of confidential informant. *Infra* Forms 5.43A, 5.43B; Wis. Stat. § 905.10.

Publicity

☐ Motion for restriction of publicity and media coverage in court. SCR ch. 61.

☐ Motion for temporary restraining order and preliminary injunction against prosecutor, assistants, employees, and state and local law enforcement officers relating to pretrial publicity (gag order). SCR 20:3.6.

☐ Motion for order restraining prosecutorial misconduct in pretrial publicity. SCR 20:3.6.

☐ Motion to exclude television or still cameras from courtroom. SCR ch. 61.

Witnesses

☐ Motion for interstate extradition of witness. *Infra* Forms 5.56C, 5.56D; Wis. Stat. § 976.02.

☐ Motion to transport prisoner; writ of habeas corpus ad testificandum. *Infra* Forms 5.56A, 5.56B; Wis. Stat. §§ 782.44–.45.

☐ Motion for expert or investigator funding. *Infra* Forms 10.28B, 10.28C; Wis. Stat. §§ 165.79, 885.08–.10.

☐ Motion for order allowing deposition of witness. Wis. Stat. §§ 967.04, 971.23(6).

☐ Motion for in camera inspection of witness statements and masking of irrelevant material. Wis. Stat. § 971.23(6m).

☐ Demand for disclosure of criminal record of witness. Wis. Stat. § 971.23(1)(f).

☐ Motion and affidavit for bail for witness. Wis. Stat. § 969.01(3).

☐ Motion to quash subpoena.

☐ Motion to take child's testimony outside courtroom. Wis. Stat. § 972.11(2m).

Miscellaneous

❑ Motion for bill of particulars. *Infra* Form 5.41A; Wis. Stat. §§ 968.01–.03.

❑ Motion to make more definite and certain. *Infra* Form 5.41B; Wis. Stat. §§ 968.01–.03; *State v. Kempainen*, 2015 WI 32, 361 Wis. 2d 450, 862 N.W.2d 587.

❑ Notice of alibi. *Infra* Form 5.42A; Wis. Stat. § 971.23(8).

❑ Motion to return seized property. Wis. Stat. §§ 968.20, 961.55(1k) (right to pretrial hearing).

❑ Motion for jury view of alleged crime scene. Wis. Stat. § 972.06.

❑ Motion for extension of time to file motions.

❑ Motion to enforce plea agreement.

❑ Motion to admit other conduct of sexual assault victim. Wis. Stat. §§ 971.31(11), 972.11(2).

❑ Motion for appointment of special prosecutor (disqualification of assigned prosecutor). *State v. Medina*, 2006 WI App 76, 292 Wis. 2d 453, 713 N.W.2d 172.

❑ Motion to stay proceedings. Wis. Stat. § 809.50; *State v. Vairin M.*, 2002 WI 96, ¶ 33, 255 Wis. 2d 137, 647 N.W.2d 208.

❑ Motion for defendant to attend court free of shackles. *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (constitutionality of visible restraints); *but c.f. Shirley v. Tegels,* 61 F.4th 542 (7th Cir. 2023) (constitutionality of hidden restraints).

IV. Motion: Basic Form [§ 5.17]

Commentary and Instructions for Form 5.17A

Form 5.17A Motion: Basic Form (CRM-0029)

There are few formal requirements for motions in criminal cases. The defense attorney should nevertheless be familiar with the general requirements of civil motion practice. Wis. Stat. § 972.11(1) provides that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." The rules applicable to captions, signing, and other matters of form of pleadings apply to all criminal-case motions, except that affidavits in support of a motion need not be separately captioned if served and filed with the motion. Wis. Stat. § 802.01(2)(d).

Every motion should contain the following four parts: (1) caption; (2) body, including a jurisdictional reservation; (3) date line; and (4) closing. The caption must set forth the name of the court, the venue, the title of the action, the file number, and a brief description of the type of order or relief sought (i.e., motion to dismiss, motion to suppress, etc.). *See id.*; Wis. Stat. § 802.04(1). If the county where the case is being heard has special branches or divisions (e.g., Milwaukee County's Criminal Division), the name of the branch or division may be included in the caption, but is not necessary unless a local court rule so requires. The paragraphs of a motion may be numbered for ease of reference.

> ***Note.*** Under Wis. Stat. § 971.30(2)(b), all motions must include "a denomination of the party seeking the order or relief." Thus, "Defendant's" should precede "Motion" in the caption.

Every motion should state that the defendant's appearance is a special appearance and that the defendant reserves the right to challenge the court's jurisdiction. *See State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975).

It is always advisable to cite statutory authority, case law, and both the state and federal constitutions, as applicable, in the body of the motion. The writer should use plain language, rather than archaic legal language, whenever possible.

The date line is probably superfluous but may be needed because of the time limitations for many motions. No special format is necessary. The traditional format is "Dated at *(city, state)* this *(day)* of *(month)*, *(year)*." A simpler, and preferable, format is "Dated: ______________."

Each motion must be signed by the attorney and must contain the attorney's name, address, state bar number (if any), telephone number, email address, and law firm name (if any). Wis. Stat. § 802.05(1).

Motions must be on paper no larger than 8½ inches by 11 inches. *See* Wis. Stat. § 801.145.

Normally the motion should be e-filed. If the case does not yet exist in the e-filing system, the attorney should file the original with the court and serve copies on the district attorney, counsel for any co-defendants who are joined, and the client. The original and counsel's file copy should be stamped by the clerk of court and the district attorney's office, to prevent arguments over misplaced or misfiled documents.

The opposing party is entitled to be advised in a timely manner of the filing of a motion and of the date, time, and place of any hearing. The notice of motion may be a separate document, *see infra*

Forms 5.18A, 5.18B, or the notice may be incorporated into the motion, *see* Wis. Stat. § 802.01(2)(a). The party must receive notice at least five days before the hearing. Wis. Stat. § 801.15(4). Three additional days are required if service is by mail; one additional day is required if service is by fax, email, or the e-filing system after normal business hours (i.e., between 5:00 p.m. and midnight). *See* Wis. Stat. § 801.15(5); *see also* Wis. Stat. § 801.15(1)(b) (computation of time).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.17A Motion: Basic Form (CRM-0029)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION *(TO/FOR)* *(state relief sought)*

[*BODY*]

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge this court's jurisdiction, moves the court for *(indicate relief requested)*. The defendant brings this motion pursuant to Wis. Stat. §*(§)* *(specify section number(s) of statute(s) authorizing motion)* on the grounds that *(state basis for relief requested, citing statutes, case law, and federal and state constitutional provisions relied on)*.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

[*DATE LINE*]

Dated: ____________________

[*CLOSING*]

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line] ____________________

____

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

V. Notice of Motion [§ 5.18]

Commentary and Instructions for Forms 5.18A–5.18B

Form 5.18A	Notice of Motion (A) (CRM-0030)
Form 5.18B	Notice of Motion (B) (CRM-0031)

A notice of motion advises the parties of the date, time, and place set for the hearing on the motion. The notice may be a separate document, such as Form 5.18A or 5.18B, *infra*, or the notice may be incorporated into the motion, *see* Wis. Stat. § 802.01(2)(a).

The Criminal Code contains no requirement for a notice of motion and no specific time periods for service, other than the general requirement of filing motions within 10 days after the initial appearance in misdemeanor cases and within 10 days after the arraignment in felony cases. *See* Wis. Stat. § 971.31(5)(a). It is generally advisable, however, to observe the time limitations in Wis. Stat. § 801.15, which impose the general requirements for serving notice of hearings and copies of motions and accompanying affidavits. Service must be provided at least five days before the hearing, Wis. Stat. § 801.15(4), but three additional days are required if service is by mail, and one additional day is required if service is by fax, email, or the e-filing system after normal business hours (i.e., between 5:00 p.m. and midnight). *See* Wis. Stat. § 801.15(5); *see also* Wis. Stat. § 801.15(1)(b) (computation of time).

Form 5.18A, *infra*, is the standard form for a notice of motion. It states the date, time, and place of the hearing. Form 5.18B, *infra*, is an alternative form that can be used when no specific date has been set for the hearing.

A notice of motion should contain a jurisdictional reservation to preserve jurisdictional objections for appeal.

> ***Practice Tip.*** In practice, the notice of motion might not need to be filed; it might be sufficient to provide a copy of the motion to the DA's office. Counsel should consider contacting the local public defender's office for details on local court procedures.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.18A Notice of Motion (A) (CRM-0030)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S NOTICE OF MOTION *(TO/FOR)* *(state relief sought)*

TO: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* County
(4.02) (Prosecutor's Address)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, hereby provides notice that *(he/she)* will bring on for hearing the motion*(s)* that *(is/are)* attached to this notice on __________, at __ o'clock __.m., or as soon thereafter as counsel may be heard, before the Honorable *(6.01) (Assigned Judge)* in *(his/her)* courtroom located at *(6.02) (Courthouse Address)*.

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.18B Notice of Motion (B) (CRM-0031)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S NOTICE OF MOTION *(TO/FOR)* *(state relief sought)*

TO: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* County
(4.02) (Prosecutor's Address)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, hereby provides notice that, on a date and at a time and place to be designated by the court, the defendant will move the court for an order granting the motion(s) attached to this notice.

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

VI. Proof of Service [§ 5.19]

Commentary and Instructions for Forms 5.19A–5.19C

Form 5.19A	Affidavit of Personal Service (CRM-0032)
Form 5.19B	Affidavit of Service by Mail (CRM-0033)
Form 5.19C	Admission of Personal Service (CRM-0034)

The statutes require that all written motions and notices be served. *See* Wis. Stat. § 801.14(1). Service is necessary to give opposing parties and their counsel adequate notice of a motion and the time of the hearing on the motion. The moving party may serve a notice and motion by mailing a copy, by personally handing a copy to opposing counsel, by leaving a copy at opposing counsel's office with a person in charge, by transmitting a copy by fax, or by email if opposing counsel has consented to service by email. Wis. Stat. § 801.14(2); *see also* Wis. Stat. § 801.14(2m) (when attorney has filed a limited appearance for a self-represented person, anything required to be served under Wis. Stat. § 801.14(1) must be served on the self-represented person and the attorney). The moving party must serve a notice and motion at least five days before the hearing. Wis. Stat. § 801.14(4). If service is by mail, three additional days are required; if service is by fax, email, or the e-filing system after normal business hours (i.e., between 5:00 p.m. and midnight), one additional day is required. *See* Wis. Stat. § 801.15(5).

In criminal cases, a generally accepted practice is to prepare an original for filing with the clerk of court, and two copies. Upon filing the original and having the copies date-stamped, defense counsel then delivers a date-stamped copy to the district attorney's office and requests that the district attorney's office date-stamp the defense attorney's copy. When filing is done by mail, the generally accepted practice is to send a letter to the court with the original, copied to opposing counsel, indicating that opposing counsel has been simultaneously served.

The filing of the motion constitutes a certification by the attorney that the motion has been timely served on all parties required to be served. Wis. Stat. § 801.14(4). Affidavits of service, *see infra* Forms 5.19A–5.19B, are therefore not required; however, attorneys often complete them in anticipation of the possible need to prove service. Alternatively, the person receiving the motion and notice may admit service. *See infra* Form 5.19C. Yet another approach, if the defense attorney serves and files a motion immediately before another hearing in the case, is to enter into the record the fact that the attorney served and filed a motion that day.

Distribution

Original:	E-file
Copy:	Client file

Notes

Form 5.19A Affidavit of Personal Service (CRM-0032)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT OF PERSONAL SERVICE

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(Affiant's name), being sworn, says that on *(date)*, in the above-captioned matter *(he/she)* personally served copies of the following:

(List and number each document separately.)

Copies of all of the above-listed items are attached to this affidavit. All of the above were personally served on the following persons according to statute:

(List and number each person separately.
Include each person's address.)

______________________/s/______________________
(Affiant's Name)

(Affiant's Address and Telephone No.)
(Affiant's Email Address)

Signed and sworn to before me
on ____________________ *(date)* ____________________

by ______________________________
____

/s/
____
Notary Public, State of Wisconsin
My commission ____________________
☐ This notarial act involved the use of communication technology.

Form 5.19B Affidavit of Service by Mail (CRM-0033)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT OF SERVICE BY MAIL

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(Affiant's name), being sworn, says that on *(date)*, in the above-captioned matter *(he/she)* deposited in the United States mail copies of the following:

(List and number each document separately.)

Copies of all of the above-listed items are attached to this affidavit. All of the above were personally served on the following persons according to statute:

(List and number each person separately.
Include each person's address.)

________________ */s/* ________________
(Affiant's Name)

(Affiant's Address and Telephone No.)
(Affiant's Email Address)

Signed and sworn to before me
on ________________ *(date)* ________________

by ________________________________

/s/

Notary Public, State of Wisconsin
My commission ____________________

☐ This notarial act involved the use of communication technology.

Form 5.19C Admission of Personal Service (CRM-0034)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

PLANTIFF'S ADMISSION OF PERSONAL SERVICE

I, *(name of person served)*, admit personal service of the following documents:

(List and number each document separately.)

Dated: ______________________________

______________________ /s/ ______________________
(Name of Person Served)

(Address and Telephone No.)
(Attorney's Email Address)

VII. Substitution of Judge [§ 5.20]

Commentary and Instructions for Form 5.20A

Form 5.20A Defendant's Request for Substitution of Judge (CRM-0035)

Wis. Stat. § 971.20 provides the defendant with the option of substituting another judge for the presiding judge. Form 5.20A, *infra*, is the form for exercising the right of substitution.

There are three major limitations to the right of substitution. First, the defendant does not have the right to designate the new judge; the chief judge for the district may assign any judge within the district. Wis. Stat. §§ 971.20(8), 751.03(3). Second, "the defendant has a right to only one substitution of a judge," unless later appellate proceedings result in a new trial or new sentencing hearing. Wis. Stat. § 971.20(2), (7). Third, the statute restricts the timing of the request. *See* Wis. Stat. § 971.20(3)–(7).

The request must be in writing and must be "filed with the clerk before making any motions to the trial court and before arraignment." Wis. Stat. § 971.20(4). Additional statutory requirements govern assignment of a new judge after arraignment, Wis. Stat. § 971.20(5), and substitution of judge in cases involving multiple defendants, Wis. Stat. § 971.20(6).

The substitution statute, although controversial, provides a safeguard against real or perceived judicial bias against the defendant, without the need for a public airing of allegations that could harm a judge's reputation. When the right of substitution has already been exercised or has otherwise lapsed, the defendant still has the option of filing a motion to disqualify the presiding judge. This motion, however, results in the presiding judge making a factual finding as to his or her own impartiality. *See, e.g.*, Wis. Stat. § 757.19(2); *In re Disciplinary Proc. Against Crosetto*, 160 Wis. 2d 581, 583–84, 466 N.W.2d 879 (1991); *cf. State v. Allen*, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863 (per curiam) (considering motion for recusal of individual justice; court was evenly divided over authority of entire court to rule on the motion).

> ***Note.*** The substitution law is controversial because, if used consistently against an individual judge, it arguably has the effect of nullifying the decision of the county's voters to entrust that judge with presiding over criminal cases. Conversely, it arguably promotes the appearance of fairness and serves a function comparable to peremptory strikes of jurors, *see* Wis. Stat. §§ 972.03–.04.

Attorneys should consult with their clients before filing substitution requests. Although the substitution decision may not be as fundamental as the decision on which plea to enter or whether to testify, the presiding judge will be responsible for sentencing if the defendant is convicted. Thus, the attorney should give his or her advice regarding substitution but also should give strong consideration to the client's wishes.

In deciding whether to substitute, the attorney must consider the attributes of both the presiding judge and the judge or judges most likely to be assigned after a substitution. Attorneys unfamiliar with the presiding judge or with local practices should consult with an experienced local public defender or private-practice attorney focusing on criminal defense.

Attorneys must also be wary of the procedural requirements of Wis. Stat. § 971.20(4). The substitution request must be filed before arraignment, *id.*, which, in misdemeanor cases, may occur at the initial court appearance. Some local court rules might permit substitution within a designated time frame after the initial appearance. Be sure to check local rules before presuming that this option was foreclosed by a plea at the initial appearance.

The requirement that the request be filed "before making any motions," *id.*, can also be problematic. Local practices differ as to how literally this restriction is construed, but the defense attorney needs to be aware that any prior motion potentially results in loss of the substitution right. *See State v. Norwood*, 2005 WI App 218, ¶ 12, 287 Wis. 2d 679, 706 N.W.2d 683 (holding that right to substitute for newly assigned judge was forfeited by asking judge to rule on another issue). The attorney may wish to ask for a bail reduction, for dismissal of the complaint, or for other relief before filing the substitution request. After the attorney files the substitution request, the substituted judge "has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail." Wis. Stat. § 971.20(9). Thus, the substituted judge might grant a motion to reduce bail or instead might deny the motion or defer action until a new judge is assigned.

The defense does not have the right to substitute a judge assigned to the case after a determination of guilt, unless later postconviction proceedings have resulted in the defendant being granted a new trial or sentencing hearing. *See State v. Wisth*, 2009 WI App 53, ¶ 9, 317 Wis. 2d 719, 766 N.W.2d 781.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

The motion must be filed jointly and signed by all defendants. Wis. Stat. § 971.20(6).

Form 5.20A Defendant’s Request for Substitution of Judge (CRM-0035)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT’S REQUEST FOR SUBSTITUTION OF JUDGE

Pursuant to Wis. Stat. § 971.20, the defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court’s jurisdiction, requests a substitution for the Honorable *(name)* as judge in the above-titled action.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

VIII. Motion to Dismiss: Basic Form [§ 5.21]

Commentary and Instructions for Form 5.21A

Form 5.21A Motion to Dismiss: Basic Form (CRM-0036)

Form 5.21A, *infra*, is a basic form for a motion to dismiss. Motions to dismiss may challenge subject-matter jurisdiction, personal jurisdiction, or competency to exercise jurisdiction. *See infra* § 5.23, Commentary and Instructions for Form 5.23A. Subject-matter jurisdiction is the authority of the court to decide the type of case in question. *State v. Smith*, 2005 WI 104, ¶ 18, 283 Wis. 2d 57, 699 N.W.2d 508. Personal jurisdiction is the authority of the court over the individual. Competency to exercise jurisdiction is a narrower concept, describing the court's power to exercise jurisdiction in a specific case. *See id.* (providing example of a court losing competency to adjudicate a case after mandatory time limits have expired).

A guilty plea cannot waive the right to challenge subject-matter jurisdictional defects. *Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). Nevertheless, it is safest to assume that objections to all defects could be waived if not raised.

Attorneys risk waiving objections to defects in personal jurisdiction if not timely raised. *See State v. Chabonian*, 55 Wis. 2d 723, 726, 201 N.W.2d 25 (1972); *State v. Copening*, 103 Wis. 2d 564, 570, 309 N.W.2d 850 (Ct. App. 1981). Wis. Stat. § 971.31(2) provides that "defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded … shall be raised before trial by motion or be deemed waived." In felony actions, the attorney must raise objections based on the insufficiency of the complaint before the preliminary examination or waiver of the preliminary, or the objections will be deemed waived. Wis. Stat. § 971.31(5)(c).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.21A Motion to Dismiss: Basic Form (CRM-0036)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. §*(§)* *(specify section number(s) of statute(s) authorizing motion)* on the grounds that *(state basis for relief requested, citing statutes, case law, and federal and state constitutional provisions relied on)*.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney's Email Address)

IX. Motion to Dismiss: Precharging or Prearrest Delay [§ 5.22]

Commentary and Instructions for Form 5.22A

Form 5.22A	Motion Dismiss: Precharging or Prearrest Delay (CRM-0037)

Form 5.22A, *infra*, is a motion to dismiss on grounds that (1) the state's delay in arresting or charging the accused resulted in actual prejudice to the accused; and (2) the delay arose from an improper motive, such as the intent to gain a tactical advantage over the accused or to harass the accused. *See State v. Wilson*, 149 Wis. 2d 878, 904–05, 440 N.W.2d 534 (1989) (quoting *United States v. Gouveia*, 467 U.S. 180, 192 (1984)); *State v. Monarch*, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.22A Motion to Dismiss: Precharging or Prearrest Delay (CRM-0037)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the state's *(precharging/prearrest)* delay violated the rights guaranteed by U.S. Const. amends. IV, V, VI, and XIV; Wis. Const. art. I, §§ 7, 8, and 11; and *State v. Wilson*, 149 Wis. 2d 878, 904–05, 440 N.W.2d 534 (1989).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

X. Motion to Dismiss: Defective Complaint [§ 5.23]

Commentary and Instructions for Form 5.23A

Form 5.23A Motion to Dismiss: Defective Complaint (CRM-0038)

Form 5.23A, *infra*, asks for a dismissal based on a defective criminal complaint. Wis. Stat. § 968.01(2) defines a *complaint* as "a written statement of the essential facts constituting the offense charged."

Criminal complaints in Wisconsin usually have two main sections. The first, called the charging section, contains the language of the criminal statute or statutes stating the basic elements of the offense. Occasionally, case law grafts an additional element onto the statutory elements. A complaint or information that fails to set forth all elements of the offense is nonetheless sufficient if it contains the correct citation to the substantive criminal statute. *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), *overruled in part on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

The second main section of the complaint, called the probable cause section, contains the essential facts constituting the offense charged. In *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 161 N.W.2d 369 (1968), the court defined the term *essential facts*:

> The [defendant] under the Wisconsin statute involved is entitled to have set forth in a written complaint the "essential facts" constituting the offense charged. This does not entitle him to some encyclopedic listing of all evidentiary facts upon which the state intends to rely for his conviction. It requires only that essential facts be set forth, preferably concisely and certainly clearly.
>
> In university journalism classes, students are taught that the lead paragraph to a news story must be made "… complete and clear through answering the questions that immediately arise—the so-called 'Five W's'—what, who, where, when, why." It is such basically essential queries that a criminal complaint is statutorily expected to answer. What is the charge? Who is charged? When and Where is the offense alleged to have taken place? Why is this particular person being charged? Actually, there is a sixth "W." … "'Who says so?'" Where a complaint is filed on the basis of information and belief, this requires setting forth of enough underlying facts to permit the reasonable inference that the sources of information are probably truthful.

Id. at 229–30 (footnotes omitted). As indicated by this quotation, the reliability of hearsay information contained in a criminal complaint is subject to challenge. In evaluating the reliability of such information, the court must weigh the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining test for probable cause in an application for a search warrant). Under this test, the court must determine whether, given all the circumstances, including the informer's credibility and the basis of the informer's knowledge, probable cause exists. *Id.*

A motion challenging the sufficiency of a criminal complaint may address problems of either personal jurisdiction or subject-matter jurisdiction. Failure of the complaint to state sufficient facts to support the conclusion that the defendant committed the crime charged is a defect in personal jurisdiction. *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175 (1970); *State ex rel. Evanow*, 40 Wis. 2d 223; *see also State v. Haugen*, 52 Wis. 2d 791, 191 N.W.2d 12 (1971). On the other hand, a subject-matter jurisdictional defect exists if the complaint fails to identify the criminal statute allegedly violated or to specify the alleged offense sufficiently to allow the defendant to prepare a defense. *See Petrone*, 161 Wis. 2d at 552–58; *Blenski v. State*, 73 Wis. 2d 685, 695–96, 245 N.W.2d 906 (1976).

A complaint is defective if it merely recites the language of the statute allegedly violated. *See Cullen*, 45 Wis. 2d 432. A complaint must also contain a statement of the possible penalties for the offenses charged. Wis. Stat. § 970.02(1)(a). Thus, short-form complaints that merely recite the statute violated, and the uniform traffic citations used to charge some traffic crimes, *see* Wis. Stat. § 345.11, are insufficient. 63 Wis. Op. Att'y Gen. 540 (1974), https://www.doj.state.wi.us/dls/ag-opinion-archive (click on "1971 - 1980"; then click on "1974"). *But see Petrone*, 161 Wis. 2d at 552–58 (holding that complaint was sufficient when it cited statute number, despite omitting one element of offense).

> ***Practice Tip.*** The more detail provided in the motion to dismiss, the higher the probability that the state will file an amended complaint before the motion hearing. When drafting a motion to dismiss the complaint, the attorney must walk a fine line between complying with the specificity required under Wis. Stat. § 971.30(2) and providing the prosecution with a blueprint for an amended complaint. If the state is able to amend the complaint, however, the state can still do so after the motion is granted. Consider using the Wisconsin criminal jury instructions as a guide to show the judge what elements are missing from the complaint.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.23A Motion to Dismiss: Defective Complaint (CRM-0038)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the court lacks jurisdiction over the defendant because the criminal complaint by which the defendant is charged is defective. Specifically, the complaint fails to set forth essential facts from which it could be inferred that the defendant committed a crime, and fails to state the essential facts constituting the offense charged as required by law, all in violation of the rights guaranteed by U.S. Const. amends. IV, V, and XIV; Wis. Const. art. I, §§ 1, 8, and 11; Wis. Stat. §§ 968.01 and 968.02; and *State v. Haugen*, 52 Wis. 2d 791, 191 N.W.2d 12 (1971), *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175 (1970), and *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 161 N.W.2d 369 (1968).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

____

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XI. Motion to Dismiss: Unconstitutional Statute [§ 5.24]

Commentary and Instructions for Form 5.24A

Form 5.24A Motion to Dismiss: Unconstitutional Statute (CRM-0039)

Form 5.24A, *infra*, seeks dismissal of the proceedings on grounds that the criminal statute relied on is unconstitutional. If the law is unconstitutional, the court is deprived of subject-matter jurisdiction. *Mack v. State*, 93 Wis. 2d 287, 295, 286 N.W.2d 563 (1980); *Servonitz v. State*, 133 Wis. 231, 235, 113 N.W. 277 (1907); *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 532, 280 N.W.2d 316 (Ct. App. 1979). The circuit court may decide issues of constitutionality of a statute. *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972). Wisconsin courts may apply a higher standard (i.e., more protective of individual rights) when interpreting the state constitution than the federal courts have applied in interpreting the U.S. Constitution. *See State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625; *State v. Hansford*, 219 Wis. 2d 226, 242, 580 N.W.2d 171 (1998).

Although courts construe statutes to avoid constitutional issues whenever possible, this rule of statutory interpretation does not permit the judiciary to rewrite legislation. *State v. Hall*, 207 Wis. 2d 54, 82–83, 90, 557 N.W.2d 778 (1997). The defense may challenge a statute as unconstitutional on its face or as unconstitutional when applied in a specific fact situation. *See, e.g.*, *State v. Hamdan*, 2003 WI 113, ¶¶ 1–6, 264 Wis. 2d 433, 665 N.W.2d 785 (holding unconstitutional, as applied to shopkeeper who kept gun near cash register, the prohibition against carrying concealed weapon); *see also District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding unconstitutional on its face a prohibition against possession in one's home of an operable firearm).

Whenever a defendant alleges that a statute or ordinance is unconstitutional, the state attorney general must be served with a copy of the motion and is entitled to be heard. Wis. Stat. § 806.04(11). As a practical matter, the attorney general rarely intervenes in such proceedings, preferring to leave the matter in the hands of the local district attorney.

> ***Practice Tip.*** If the defense attorney believes the statute under which the client is charged may be unconstitutional, he or she should review the Bill of Rights (U.S. Const. amends. I–XIV) and Wis. Const. art. I, because these sources provide a ready-made checklist to test the statute's validity. Both the federal and state constitutions should always be cited as a basis for motions challenging the constitutionality of a statute. The most common constitutional challenges are on due-process and equal-protection grounds. The attorney should also research the applicable standard of review in light of the right(s) at issue. *See Heller*, 554 U.S. at 628 n.27 (holding that presumption of constitutionality is narrower for laws that regulate a constitutional right); *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶ 61, 284 Wis. 2d 573, 701 N.W.2d 440 (noting that legislation is reviewed under "strict scrutiny" standard when it infringes on a fundamental right), *overruled on other grounds by Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678.

> ***Practice Tip.*** A constitutional challenge to a statute on its face cannot be waived by a guilty plea, but an "as-applied" challenge is susceptible to waiver. *State v. Bush (In re Commitment of Bush)*, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80. Therefore, if the defense unsuccessfully challenges the constitutionality of a statute in the circuit court, the defense attorney should be aware of the type of challenge when advising the client about any proposed plea agreement.

Distribution

Original:	E-file
Copy:	Attorney general; client; client file

Notes

Form 5.24A Motion to Dismiss: Unconstitutional Statute (CRM-0039)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the court lacks jurisdiction over the defendant because the statute the defendant is alleged to have violated *(state specific constitutional objections: e.g., the statute is unconstitutionally vague or overbroad; it denies equal protection; it unconstitutionally delegates legislative authority)*, thereby denying the defendant due process of law and proper notice of the nature and cause of the accusation, all in violation of the rights guaranteed by U.S. Const. amends. I, IV, V, VI, VIII, and XIV and Wis. Const. art. I, §§ 1, 3, 6, 7, 8, and 11.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line] ______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XII. Motion to Dismiss: Double Jeopardy [§ 5.25]

Commentary and Instructions for Form 5.25A

Form 5.25A Motion to Dismiss: Double Jeopardy (CRM-0040)

Form 5.25A, *infra*, is a motion to dismiss on the grounds of double jeopardy. Jeopardy generally attaches when the jury is sworn or, in a court trial, when the first witness is sworn. Wis. Stat. § 972.07; *see Crist v. Bretz*, 437 U.S. 28 (1978).

The double-jeopardy protection enshrined in the federal and state constitutions incorporates the related protection of issue preclusion (collateral estoppel), which precludes relitigation by the same parties of an issue of ultimate fact that has already been decided in a previous court proceeding. *See State v. Canon*, 2001 WI 11, ¶ 12, 241 Wis. 2d 164, 622 N.W.2d 270; *see also Bobby v. Bies*, 556 U.S. 825, 835 (2009); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Retrial is prohibited whenever the evidence has been found to be insufficient, whether the decision was made by a judge or a jury. *Hudson v. Louisiana*, 450 U.S. 40 (1981). The prohibition of double jeopardy does not, however, bar a trial on a greater charge after a plea to a lesser charge. *Ohio v. Johnson*, 467 U.S. 493 (1984). *But see Turner v. Arkansas*, 407 U.S. 366 (1972) (holding that later prosecution for robbery was foreclosed when jury previously found that defendant was not present at scene of robbery and murder). Double jeopardy's issue preclusion likewise does not apply when the defendant has stipulated to severance of charges and multiple trials. *Currier v. Virginia*, 138 S. Ct. 2144, 2149–50 (2018).

Double jeopardy does not always bar a retrial following a mistrial. *State v. Seefeldt*, 2003 WI 47, ¶¶ 18–19, 261 Wis. 2d 383, 661 N.W.2d 822. Unless the prosecutor deliberately provokes a mistrial by engaging in misconduct, a retrial is permissible after a successful defense request for a mistrial. *State v. Jaimes*, 2006 WI App 93, ¶¶ 7–8, 292 Wis. 2d 656, 715 N.W.2d 669. The court must, however, consider alternative remedies and make a finding on the necessity for a mistrial when the defendant objects; otherwise, a retrial violates double jeopardy. *State v. Moeck*, 2005 WI 57, ¶ 37, 280 Wis. 2d 277, 695 N.W.2d 783. A retrial is generally permissible following a mistrial stemming from the jury's failure to reach a verdict. *See Yeager v. United States*, 557 U.S. 110 (2009).

The concept of dual sovereignty may allow prosecution for the same conduct in more than one jurisdiction. *Heath v. Alabama*, 474 U.S. 82 (1985); *Abbate v. United States*, 359 U.S. 187 (1959). However, Wis. Stat. § 961.45 provides a bar to a state prosecution for a controlled-substances offense if the defendant has previously been convicted for the same act in another state or in federal court. *State v. Hansen*, 2001 WI 53, ¶ 44, 243 Wis. 2d 328, 627 N.W.2d 195. The protection against double jeopardy does not prohibit an increased sentence when the original sentence is invalid or when a retrial occurs. *State v. Lamar*, 2009 WI App 133, ¶ 17, 321 Wis. 2d 334, 773 N.W.2d 446, *aff'd*, 2011 WI 50, 334 Wis. 2d 536, 799 N.W.2d 758.

Although double-jeopardy protection prohibits multiple punishments for the same offense, it does not prevent resentencing if the sentence is vacated. Further, when resentencing occurs, the court may consider facts not known at the time of the original sentencing hearing. *See State v. Carter*, 208 Wis. 2d 142, 158, 560 N.W.2d 256 (1997).

> ***Practice Tip.*** A motion to dismiss based on double jeopardy must adequately allege the facts showing the previous final judicial determination of the same issues. The motion should state the following: the previous charges and the statutes under which they were brought, the name and

location of the court and the name of the presiding judge, the nature of the final order (e.g., dismissal with prejudice; acquittal; conviction), and the case number and date. Whenever possible, a certified copy of any order or judgment should be attached to the motion to dismiss and incorporated by reference. The motion should specify whether the charges presently before the court are (1) identical to the previous charges, (2) substantially identical charges, or (3) lesser-included charges.

The motion may ask the court to take judicial notice of the prior proceedings, pursuant to Wis. Stat. § 902.01. This procedure requires that the moving party supply the court "with the necessary information," Wis. Stat. § 902.01(4); otherwise, judicial notice is discretionary, *see* Wis. Stat. § 902.01(3).

Other motions related to double jeopardy are motions to dismiss for multiplicity, *see infra* § 5.27, and for duplicity, *see infra* § 5.28.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.25A Motion to Dismiss: Double Jeopardy (CRM-0040)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. §§ 971.28 and 971.31(2) and (5) on the grounds that the court lacks jurisdiction over the defendant because the prosecution of the defendant in this case violates *(his/her)* rights guaranteed by the double-jeopardy and due-process-of-law provisions of U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; and Wis. Stat. §§ 939.71 and 972.07.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XIII. Motion to Dismiss: *Franks-Mann* Motion [§ 5.26]

Commentary and Instructions for Forms 5.26A–5.26B

Form 5.26A	Motion to Dismiss: *Franks-Mann* Motion (CRM-0041)
Form 5.26B	Affidavit in Support of *Franks-Mann* Motion (CRM-0042)

Form 5.26A, *infra*, is a motion to dismiss on grounds that (1) the state included false statements in the complaint knowingly and intentionally, or with reckless disregard for the truth, and that without those false statements there would be no finding of probable cause; or (2) the state recklessly omitted from the complaint certain facts that, had they been included, would have resulted in a lack of probable cause. Such motions are commonly called *Franks* motions or *Mann* motions based on the two principal cases in this area, *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

Franks dealt with false statements, made knowingly and intentionally or with reckless disregard for the truth, in an affidavit used to secure a search warrant. The remedy sought in *Franks* was the exclusion of evidence seized pursuant to the search warrant. *See also State v. Anderson*, 138 Wis. 2d 451, 462–63, 406 N.W.2d 398 (1987). In *Mann*, the Wisconsin Supreme Court recognized the validity of a *Franks*-type motion as applied to a criminal complaint. *Mann*, 123 Wis. 2d 375. Under *Mann*, 123 Wis. 2d at 387, the court does not need to make a finding of "deliberateness, recklessness, innocence, or negligence in regard to challenging criminal complaints, as long as the misstatement or omissions are shown to be critical to a probable cause determination."

To secure a hearing on a *Franks*-*Mann* motion, the defense must make a substantial initial showing. The burden is on the defendant to show, in the moving documents and by a preponderance of the evidence, that a fact in the complaint is untrue or that a critical fact was omitted. *Id.* at 388. The motion and the supporting affidavit, *see infra* Form 5.26B, or offer of proof must contain allegations that a fact is untrue or that a critical (qualified) fact was omitted. Further, the documents must show that, because of the misstatement or omission, the complaint is inadequate to show probable cause. In *Mann*, the Wisconsin Supreme Court held as follows:

> If the defendant can demonstrate misstatements on the complaint or that qualified facts were omitted from the complaint, then the defendant is entitled to a *Franks* hearing where he bears the burden of proof of establishing by a preponderance of the evidence that by removing the misstatements or including the qualified omitted facts, probable cause on the face of the complaint is lacking. Even if the defendant bears his burden of proof at the hearing by a preponderance of the evidence, the judge must consider all other portions of the complaint and determine whether they establish probable cause independent of the removed or added allegations.

Id. at 393.

A dismissal of a complaint pursuant to *Franks* and *Mann* is without prejudice. The complaint may be reissued if the amended complaint can properly state probable cause. *Id.* at 387.

Distribution

Original:	E-file with the court
Copy:	Client; client file

Notes

Form 5.26A Motion to Dismiss: *Franks-Mann* Motion (CRM-0041)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the court lacks jurisdiction over the defendant because *(the complaint contains statements that are deliberately false or that were made in reckless disregard for the truth/the state recklessly omitted from the complaint certain facts that, had they been included, would have resulted in a lack of probable cause)*, thereby denying the defendant due process and equal protection of the law in violation of the rights guaranteed by U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 1, 3, 6, 7, 8, and 11; and *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.26B Affidavit in Support of *Franks-Mann* Motion (CRM-0042)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(Affiant's name), being sworn, says:

1. I am *(identify the affiant and state how the affiant has knowledge of the facts sworn to in this affidavit)*.
2. I make this affidavit in support of the defendant's motion to dismiss in this action.
3. *(State the facts supporting the motion, using the first person "I.")*

/s/
(Affiant's Name)

(Affiant's Address and Telephone No.)
(Affiant's Email Address)

Signed and sworn to before me
on *(date)*
by ______________________

_______________*/s/*_______________
Notary Public, State of Wisconsin
My commission _______________
☐ This notarial act involved the use of communication technology.

XIV. Motion to Dismiss: Multiplicity [§ 5.27]

Commentary and Instructions for Form 5.27A

Form 5.27A Motion to Dismiss: Multiplicity (CRM-0043)

Form 5.27A, *infra*, is a motion to dismiss based on multiplicity. *Multiplicity* is defined as charging a single offense in more than one count. *State v. Rabe*, 96 Wis. 2d 48, 291 N.W.2d 809 (1980). Multiplicity violates the defendant's right to be protected from multiple punishments; the defendant could receive multiple sentences for what is actually one violation of the law. Multiplicity also risks prejudicing the jury by suggesting that more than one crime was committed. A motion to dismiss on grounds of multiplicity alleges a violation of double jeopardy under both the state and federal constitutions. *See, e.g.*, *State v. Grayson*, 172 Wis. 2d 156, 493 N.W.2d 23 (1992). Generally speaking, however, whether a single transaction or event should result in only a single criminal charge is a matter of statutory construction rather than constitutional analysis. *See Missouri v. Hunter*, 459 U.S. 359, 366–68 (1983); *State v. Davison*, 2003 WI 89, ¶ 28, 263 Wis. 2d 145, 666 N.W.2d 1.

In evaluating multiplicity issues, the following guidelines should be considered:

1. The overall test is whether the legislature intended to allow cumulative punishments for the conduct in question. *Davison*, 2003 WI 89, ¶¶ 31–32, 263 Wis. 2d 145.

2. The test examines whether multiple charges for the same conduct are "identical in law and fact" and whether the legislature intended to authorize multiple convictions and punishments. *See, e.g.*, *State v. Patterson*, 2010 WI 130, ¶ 12, 329 Wis. 2d 599, 790 N.W.2d 908; *Davison*, 2003 WI 89, ¶¶ 42–45, 263 Wis. 2d 145; *State v. Derango*, 2000 WI 89, ¶ 29, 236 Wis. 2d 721, 613 N.W.2d 833. The first part of the test examines whether multiple offenses are identical in law and fact (or conversely, whether each offense requires proof of an additional fact that is not required to prove the other(s)). *See, e.g.*, *Derango*, 2000 WI 89, ¶¶ 29–30, 236 Wis. 2d 721; *State v. Eaglefeathers*, 2009 WI App 2, ¶ 11, 316 Wis. 2d 152, 762 N.W.2d 690. If one offense is a lesser-included offense of another, the two offenses are identical under this test. *See* Wis. Stat. § 939.66 (listing circumstances in which conviction permitted of lesser offense or greater offense, but not both).

3. If the charged offenses are identical in law and fact, the court will presume that the legislature did not intend to authorize multiple punishments. *Patterson*, 2010 WI 130, ¶ 15, 329 Wis. 2d 599; *Davison*, 2003 WI 89, ¶ 43, 263 Wis. 2d 145. The state can overcome this presumption by a clear expression of legislative intent. *Davison*, 2003 WI 89, ¶ 43, 263 Wis. 2d 145.

4. If the charged offenses are not identical in law and fact, the court will presume that the legislature has authorized multiple convictions and cumulative punishment. *See, e.g.*, *Patterson*, 2010 WI 130, ¶ 15, 329 Wis. 2d 599; *Davison*, 2003 WI 89, ¶ 44, 263 Wis. 2d 145. This presumption is codified in Wis. Stat. § 939.65, which generally permits prosecution of the same act under more than one criminal statute. The defendant must show clear legislative intent to overcome this presumption. *Davison*, 2003 WI 89, ¶¶ 44–45, 263 Wis. 2d 145.

5. In reviewing legislative intent, the court evaluates four factors to determine whether multiple charges are appropriate: (1) the statutory language, (2) legislative history and context, (3) the nature of the prohibited conduct, and (4) the appropriateness of imposing multiple punishments for the alleged conduct. *See, e.g.*, *Davison*, 2003 WI 89, ¶ 50, 263 Wis. 2d 145; *Eaglefeathers*, 2009 WI App

2, ¶ 15, 316 Wis. 2d 152. For example, in *Eaglefeathers*, 2009 WI App 2, ¶¶ 16–19, 316 Wis. 2d 152, the court reviewed these factors to determine that the defendant could be convicted of two counts of bail jumping for failing to appear in court for two hearings that were scheduled for the same time.

6. When multiple counts are charged for alleged violations of the same statute, the prosecutor should "tie a specific act to each count." *State v. Becker*, 2009 WI App 59, ¶ 10, 318 Wis. 2d 97, 767 N.W.2d 585. If the counts are not differentiated in this manner, the defense attorney should bring a motion to require greater specificity. *Id.*

Practice Tip. The defense attorney should consult the jury instructions and Wis. Stat. § 939.66 to identify possible multiplicity challenges to counts in the criminal complaint or information. Note that the statute prohibits multiple convictions but does not prohibit submission of both a greater- and a lesser-included offense to the fact-finder.

Sexual assault cases often present problems of multiplicity or duplicity, *see infra* Form 5.28A (Motion to Dismiss: Duplicity). Case law has identified seven factors that can be used in determining whether an episode of sexually assaultive behavior constitutes a single offense or multiple offenses: (1) the nature of the act, (2) the time, (3) the place, (4) the intent, (5) the cumulative punishment, (6) muscular contraction, and (7) the number of victims. *See, e.g.*, *State v. Meehan*, 2001 WI App 119, ¶ 32, 244 Wis. 2d 121, 630 N.W.2d 722; *Harrell v. State*, 88 Wis. 2d 546, 572, 277 N.W.2d 462 (Ct. App. 1979).

When drafting a motion to dismiss on multiplicity grounds, the attorney should be careful to state which counts are multiplicitous and why.

Distribution

Original:	E-file with the court
Copy:	Client; client file

Notes

Form 5.27A Motion to Dismiss: Multiplicity (CRM-0043)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order striking from the *(criminal complaint/information)* those counts that are multiplicitous. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the multiplicitous charges violate the defendant's rights guaranteed by the double-jeopardy and due-process-of-law provisions of U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 5, 7, and 8; Wis. Stat. §§ 939.66, 939.71, and 939.72; and *State v. Davison*, 2003 WI 89, ¶¶ 42–45, 263 Wis. 2d 145, 666 N.W.2d 1.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XV. Motion to Dismiss: Duplicity [§ 5.28]

Commentary and Instructions for Form 5.28A

Form 5.28A Motion to Dismiss: Duplicity (CRM-0044)

Form 5.28A, *infra*, is a motion to dismiss based on duplicity. *Duplicity* is defined as charging more than one offense in a single count. *State v. Chambers*, 173 Wis. 2d 237, 250, 496 N.W.2d 191 (Ct. App. 1992). A duplicitous charge violates the accused's right to be adequately informed of the nature and cause of the charges and to be protected against double jeopardy. In addition, with a duplicitous complaint, the defendant runs the risk that the jurors will have evidence of several criminal acts and reach a verdict of guilt even though they are not unanimous regarding any specific act the defendant is accused of committing. *See State v. Gustafson*, 119 Wis. 2d 676, 695–97, 350 N.W.2d 653 (1984), *modified*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985). Finally, a defendant facing a duplicitous charge may be prejudiced (or the jury may be confused) by evidentiary rulings—for example, evidence may be admissible to establish one offense but inadmissible to establish another. *State v. Lomagro*, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983).

Duplicity is also a problem with *disjunctive pleadings* (i.e., a complaint or information that charges that the defendant did this *or* that). Some statutes list, in the disjunctive, several ways that the offense may be committed. *See, e.g.*, Wis. Stat. §§ 943.20(1)(a) (theft), 947.01 (disorderly conduct). If the prosecutor disjunctively pleads multiple means of committing the offense, the defense attorney should consider moving to require the prosecutor to elect one charge. The attorney must evaluate the risk that the prosecutor might respond by dividing the count into multiple counts, thus triggering a multiplicity analysis. *See generally supra* Form 5.27A and accompanying commentary and instructions.

At the close of the evidence, the attorney should move to strike those charges not supported by the evidence. Also, if multiple means of committing the offense are submitted to the jury, the attorney should request a jury instruction on unanimous agreement as to the act committed. *See State v. Seymour*, 177 Wis. 2d 305, 502 N.W.2d 591 (Ct. App. 1993), *aff'd*, 183 Wis. 2d 683, 515 N.W.2d 874 (1994); Wis. JI—Criminal 517 and comments.

There is an important exception to the unanimity requirement in cases involving an alleged continuous course of conduct. If multiple acts can be interpreted as one continuous unlawful event, they may be aggregated into a single count. *Lomagro*, 113 Wis. 2d at 594; *State v. Molitor*, 210 Wis. 2d 415, 421–24, 565 N.W.2d 248 (Ct. App. 1997). Unanimity is generally not required as to which discrete act or acts within the course of conduct was or were committed. *State v. Johnson*, 2001 WI 52, ¶ 11, 243 Wis. 2d 365, 627 N.W.2d 455; *State v. Derango*, 2000 WI 89, ¶¶ 13–14, 236 Wis. 2d 721, 613 N.W.2d 833.

Distribution

Original:	E-file with the court
Copy:	Client; client file

Notes

Form 5.28A Motion to Dismiss: Duplicity (CRM-0044)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order striking from the *(criminal complaint) (information)* those counts that are duplicitous. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the duplicitous counts violate the defendant's rights guaranteed by the double-jeopardy and due-process-of-law provisions of the U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 5, 7, and 8; Wis. Stat. §§ 939.71 and 939.72; and *State v. Gustafson*, 119 Wis. 2d 676, 350 N.W.2d 653 (1984), *modified*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985), *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), *State v. George*, 69 Wis. 2d 92, 230 N.W.2d 253 (1975), *State v. Chambers*, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992), and *Harrell v. State*, 88 Wis. 2d 546, 277 N.W.2d 462 (Ct. App. 1979).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XVI. Waiver of Preliminary Examination [§ 5.29]

Commentary and Instructions for Form 5.29A

Form 5.29A Waiver of Preliminary Examination (CRM-0045)

Wis. Stat. §§ 970.03–.05 govern preliminary examinations. Many defense attorneys believe that preliminary examinations should not be waived unless there is some advantage to the defendant (such as an agreement by the prosecutor regarding charging, sentencing, bail, or some other issue). In some cases, however, tactical reasons may suggest waiver, such as the risk that, after the preliminary hearing, the prosecutor may add charges transactionally related to evidence presented at the hearing. *See generally infra* § 5.31, Commentary and Instructions for Forms 5.31A–5.31B. If there is adequate reason to waive the preliminary examination, the defense attorney may consider filing a written waiver such as Form 5.29A, *infra*. Some jurisdictions may have their own forms for this purpose.

> ***Practice Tip.*** The landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), is relevant to the decision whether to waive the preliminary examination. The *Crawford* Court held that, before testimonial hearsay statements are admissible under the Confrontation Clause, the defendant must have the opportunity to cross-examine the declarant. *Id.* at 68–69; *see also State v. Stuart*, 2005 WI 47, ¶¶ 31–38, 279 Wis. 2d 659, 695 N.W.2d 259 (holding that because defendant's cross-examination at the preliminary hearing was significantly restricted, admission at trial of absent witness's testimony violated Confrontation Clause). *Testimonial statements* include formal courtroom testimony and responses to police questioning. *Crawford*, 541 U.S. at 51–53.

Distribution

Original:	E-file with the court
Copy:	Client; client file

Notes

Form 5.29A Waiver of Preliminary Examination (CRM-0045)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S WAIVER OF PRELIMINARY EXAMINATION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, waives in writing *(his/her)* right to a preliminary examination. The defendant makes this waiver with the advice of *(his/her)* attorney and pursuant to Wis. Stat. §§ 970.03–.05 and 971.02. The defendant states as follows:

1. I am able to read and write the English language.

2. I understand the charges against me.

3. I make this waiver with the full knowledge and understanding that a defendant charged with a felony has a right to a preliminary examination under Wis. Stat. § 970.03.

4. I understand that the purpose of a preliminary examination is to have a hearing before a court to determine if there is probable cause to believe the defendant has committed a felony.

5. I understand that, at a preliminary examination, I would have the right, through my attorney, to cross-examine and confront the state's witnesses and to call witnesses on my behalf.

6. I understand that, at a preliminary examination the court has the authority to decide that there is not probable cause to believe the defendant committed a felony and to dismiss the charges.

7. I know that I am charged with:

(Set out completely the charges against the defendant and indicate potential penalties. List each charge in a separate

paragraph and give the full statutory citations.)

Dated: ________________________________

/s/ ________________________________
(3.01) (Client's Name)

I, *(2.01) (Attorney Handling Case)*, state that I am the attorney for the defendant, that I have personally explained and discussed all the matters mentioned in this Waiver of Preliminary Examination with my client, and that I have answered, to the best of my ability, all of *(his/her)* questions regarding this waiver. I believe that my client understands *(his/her)* right to a preliminary examination, the charges indicated above, and the potential penalties for those charges. I further state that I personally observed *(3.01) (Client's Name)* sign and date this waiver.

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XVII. Motions to Dismiss: Defective Preliminary Examination [§ 5.30]

Commentary and Instructions for Forms 5.30A–5.30B

Form 5.30A	Waiver of Preliminary Examination (CRM-0045)
Form 5.30B	Motion to Dismiss: Insufficient Preliminary Examination (CRM-0047)

The purpose of a preliminary examination is to determine whether there is probable cause to believe that the defendant committed a felony. Wis. Stat. § 970.03(1). A preliminary examination is intended to protect the accused from hasty, malicious, improvident, and oppressive prosecution and to avoid the expense, humiliation, and anxiety of a public trial if no probable cause exists. *See Taylor v. State*, 55 Wis. 2d 168, 197 N.W.2d 805 (1972); *Thies v. State*, 178 Wis. 98, 189 N.W. 539 (1922); *State v. Copening*, 103 Wis. 2d 564, 578, 309 N.W.2d 850 (Ct. App. 1981).

A defendant who claims that error occurred in a preliminary examination must raise the issue before trial. *See State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991). There are three potential pretrial remedies for a defendant who is dissatisfied with what occurred at the preliminary examination: (1) a motion to dismiss brought in the circuit court; (2) a challenge to the bindover by way of a permissive interlocutory appeal from the nonfinal order binding the defendant over for trial, Wis. Stat. § 809.50; and (3) a challenge to the bindover by supervisory writ, if the defendant can show that there was, in fact, a defect in subject-matter or personal jurisdiction, Wis. Stat. § 809.51; *Webb*, 160 Wis. 2d at 636.

Form 5.30A, *infra*, is a motion to dismiss based on an untimely preliminary examination. If the defendant is not in custody, the preliminary examination must be held within 20 days after the initial appearance. If the defendant is in custody and bail exceeds $500, the hearing must be held within 10 days. Wis. Stat. § 970.03(2). The parties may stipulate to extend the time limit, or the defendant may waive the time limit. *Id*. Failure to hold the preliminary examination within the time limit deprives the court of personal jurisdiction. The defendant must, however, assert the objection to an untimely preliminary examination or it is waived. The defendant's silence constitutes a waiver of the objection. If the court grants a motion to dismiss on the basis of a failure to comply with the time limit, the dismissal is without prejudice. *Armstrong v. State*, 55 Wis. 2d 282, 285, 198 N.W.2d 357 (1972); *Logan v. State*, 43 Wis. 2d 128, 138, 168 N.W.2d 171 (1969); *State ex rel. Klinkiewicz v. Duffy*, 35 Wis. 2d 369, 375, 151 N.W.2d 63 (1967).

> ***Practice Tip.*** When the defense has an opportunity to obtain a dismissal, the attorney ordinarily should take the opportunity and seek dismissal, even if it is without prejudice and the state is likely to reissue charges. Following such a dismissal, the defense has a new opportunity to gain some strategic advantages, such as bargaining for a reduced charge, arguing for lower bail, or even preventing a reissuance.

Form 5.30B, *infra*, is a motion to dismiss based on an insufficient preliminary examination. This motion is filed with the circuit court and is really a renewal of the oral motion made at the conclusion of the preliminary examination. If the state does not have a substantial basis for the prosecution, the court should dismiss the charges and the defendant should be granted his or her liberty. *See State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 110 (1981). The level of probable cause that must be demonstrated at a preliminary examination is greater than that required for issuance of an arrest warrant. *State v. Berby*, 81 Wis. 2d 677, 683, 260 N.W.2d 798 (1978); *State v. Knoblock*, 44 Wis. 2d 130, 134, 170 N.W.2d 781 (1969). A defendant may be bound over for trial if the evidence at a preliminary examination establishes, to a reasonable probability, that a crime has been committed and that the defendant committed it. *State ex* *rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 605, 267 N.W.2d 285 (1978). Probable cause at a preliminary examination is satisfied when the prosecution states a believable or plausible account of the defendant's commission of a felony. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). The role of the preliminary hearing magistrate is to assess the plausibility of the witnesses' testimony and whether, if believed, the testimony would support a bindover. *Id.* at 397; *Vigil v. State*, 76 Wis. 2d 133, 144, 250 N.W.2d 378 (1977).

> ***Practice Tip.*** Defense attorneys are frequently stymied at preliminary examinations by the state's objection that the credibility of the witness is not an issue. The district attorney may contend that case law limits the court to a determination of the plausibility of the prosecution's version of the facts. This interpretation of the decisions is not completely accurate. The decisions that discuss the plausibility-versus-credibility issue recognize that the line dividing these two concepts is a thin one and is often difficult to define. The case law does not completely prevent a defendant from attacking a witness's credibility at the preliminary examination; if a witness's testimony is inherently or patently incredible, the accused should be allowed to demonstrate this fact. *State v. Marshall*, 92 Wis. 2d 101, 115 n.3, 284 N.W.2d 592 (1979).

A motion to dismiss on grounds of an insufficient preliminary examination should be distinguished from a challenge to charges in the information, which raises a different issue. *See infra* Form 5.31B.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.30A Motion to Dismiss: Untimely Preliminary Examination (CRM-0046)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the defendant has not been provided with a preliminary examination in this case within the statutorily prescribed time limits, in violation of the rights guaranteed by U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. § 970.03(2); and *Armstrong v. State*, 55 Wis. 2d 282, 198 N.W.2d 357 (1972), *Logan v. State*, 43 Wis. 2d 128, 168 N.W.2d 171 (1969), and *State ex rel. Klinkiewicz v. Duffy*, 35 Wis. 2d 369, 151 N.W.2d 63 (1967).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.30B Motion to Dismiss: Insufficient Preliminary Examination (CRM-0047)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence presented at the preliminary examination does not support a finding that the defendant probably committed *(a felony/any crime)*, in violation of the rights guaranteed U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. § 970.03(1); and *State v. Dunn*, 121 Wis. 2d 389, 359 N.W.2d 151 (1984), *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 267 N.W.2d 285 (1978), and *State v. Berby*, 81 Wis. 2d 677, 260 N.W.2d 798 (1978).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line] ____________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XVIII. Motion to Dismiss: Defective Information [§ 5.31]

Commentary and Instructions for Forms 5.31A–5.31B

Form 5.31A	Motion to Dismiss: Untimely Information (CRM-0048)
Form 5.31B	Motion to Dismiss: Insufficient Evidence to Support the Information (CRM-0049)

The *information* is the charging document in a felony case that is filed after the preliminary examination. The prosecution must base the information on all the facts and circumstances connected with the preliminary examination. Wis. Stat. § 971.01(1).

> ***Practice Tip.*** Although waiving the client's right to a preliminary examination is generally considered bad practice, doing so might be advisable if the preliminary examination might result in the filing of additional, or more serious, charges in the information. If the defendant waives his or her right to a preliminary examination, additional charges may still be added, but the information must be limited to charges related to events described in the complaint. *State v. Michels*, 141 Wis. 2d 81, 89, 414 N.W.2d 311 (Ct. App. 1987); *see supra* Form 5.29A (Waiver of Preliminary Examination).

Form 5.31A, *infra*, is a motion to dismiss based on untimely filing of the information. This motion addresses the issue of personal jurisdiction. The state must file the information with the clerk of court within 30 days after the preliminary examination. Wis. Stat. § 971.01(2). On motion of the district attorney, the court may grant an extension of the 30-day time limit for filing the information. Failure to file within the time limit entitles the defendant to have the action dismissed without prejudice. *Id.* The defendant may waive this time limit, however, either expressly or by failure to object to an untimely filing.

Wis. Stat. § 971.01 does not require that the defendant be served with the information within the 30-day time limit for filing. *State v. May*, 100 Wis. 2d 9, 301 N.W.2d 458 (Ct. App. 1980). Wis. Stat. § 971.05(3) requires the district attorney to give the defendant a copy of the information at the arraignment; there is no time limit specified for holding the arraignment. There do not seem to be any cases on point, but the defense attorney should consider seeking a dismissal with prejudice if the delay in providing the information to the defendant has been excessive. *See id.*

Form 5.31B, *infra*, is a motion to dismiss based on insufficient evidence to support the information. The information must be supported by the evidence, or by reasonable inferences derived from the evidence, presented at the preliminary examination. The district attorney is limited only by the evidence, not by the charges listed in the original criminal complaint or by a finding of the preliminary-hearing magistrate. *State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 110 (1981). In fact, if counts in the information are transactionally related to a charge that is supported by probable cause, the state need not establish probable cause at the preliminary hearing as to each specific count. *State v. Williams*, 198 Wis. 2d 479, 544 N.W.2d 400 (1996); *State v. Burke*, 153 Wis. 2d 445, 451 N.W.2d 739 (1990).

The district attorney has the duty to review the evidence produced at the preliminary examination and, if it established probable cause, he or she may file an information based on that evidence. It is an abuse of discretion for the district attorney to file an information wholly unrelated to the evidence or reasonable inferences based on the evidence. *State v. Akins*, 198 Wis. 2d 495, 544 N.W.2d 392 (1996); *Hooper*, 101 Wis. 2d 517. Therefore, a motion to dismiss based on insufficient evidence challenges the district attorney's exercise of discretion in filing the charge or charges contained in the information.

In evaluating whether the prosecutor abused his or her discretion, the reviewing court should consider the following questions:

1. Is the charge wholly unrelated to the facts and circumstances testified to at the preliminary examination? *See Williams*, 198 Wis. 2d 479; *Akins*, 198 Wis. 2d 495; *Hooper*, 101 Wis. 2d 517.
2. Are the charges transactionally related to the evidence adduced at the preliminary examination in terms of the parties and witnesses involved, geographical proximity, time, physical evidence, motive, and intent? *State v. Richer*, 174 Wis. 2d 231, 496 N.W.2d 66 (1993); *State v. Burke*, 153 Wis. 2d 445, 451 N.W.2d 739 (1990).
3. Is the charge of such doubtful merit that the reviewing court can conclude it was issued for the purpose of coercing the defendant to plead guilty to a less serious offense? *Hooper*, 101 Wis. 2d 517.

A motion to dismiss based on insufficient evidence should be distinguished from a challenge to the sufficiency of the preliminary examination, which raises a different issue. *See supra* Form 5.30B.

Distribution

Original: E-file
Copy: Client; client file

Notes

Form 5.31A Motion to Dismiss: Untimely Information (CRM-0048)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that an information has not been timely filed or served on the defendant in this case, in violation of the rights guaranteed by U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. § 971.01(2); and *State v. May*, 100 Wis. 2d 9, 301 N.W.2d 458 (Ct. App. 1980).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.31B Motion to Dismiss: Insufficient Evidence to Support the Information (CRM-0049)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing the information filed in this case. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the information is not supported by the evidence presented at the preliminary examination, in violation of the rights guaranteed by U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 6, 7, and 8; Wis. Stat. §§ 970.03(1) and 971.01(1); and *State v. Williams*, 198 Wis. 2d 479, 544 N.W.2d 400 (1996), *State v. Akins*, 198 Wis. 2d 495, 544 N.W.2d 392 (1996), *State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 110 (1981), *State v. Burke*, 153 Wis. 2d 445, 451 N.W.2d 739 (1990), and *State v. Michels*, 141 Wis. 2d 81, 414 N.W.2d 311 (Ct. App. 1987).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XIX. Motion to Dismiss: Vindictive or Retaliatory Prosecution [§ 5.32]

Commentary and Instructions for Form 5.32A

Form 5.32A	Motion to Dismiss: Vindictive or Retaliatory Prosecution (CRM-0050)

Form 5.32A, *infra*, is a motion to dismiss based on vindictive or retaliatory prosecution. This motion is designed to raise the issue of a prosecution provoked by improper motives. A prosecution initiated to prevent or punish the exercise of constitutional rights, or prompted by the prosecutor's personal vindictiveness, is a vindictive or retaliatory prosecution. The defendant must make a substantial showing that the government's prosecution is based on a personal vendetta or on a desire to prevent or punish the exercise of constitutional rights. *See Thigpen v. Roberts*, 468 U.S. 27 (1984); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Blackledge v. Perry*, 417 U.S. 21 (1974); *Sears v. State*, 94 Wis. 2d 128, 135, 287 N.W.2d 785 (1980); *State v. Minniecheske*, 118 Wis. 2d 357, 347 N.W.2d 610 (Ct. App. 1984).

The prosecutor does not necessarily violate a defendant's due-process rights, however, by adding charges or increasing the severity of a pending charge, if the defendant refuses to plead guilty to the original charge. *See, e.g.*, *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The prosecutor may legitimately offer to settle the case by reducing, dismissing, or refraining from pursuing charges. *See Goodwin*, 457 U.S. at 379. Similarly, if a conviction based on a guilty plea is vacated, an increased sentence following a trial does not raise a presumption of vindictiveness. *Alabama v. Smith*, 490 U.S. 794 (1989); *see also State v. Naydihor*, 2004 WI 43, ¶¶ 56–57, 270 Wis. 2d 585, 678 N.W.2d 220 (upholding increased sentence after circuit court granted defendant's motion to set aside original sentence).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.32A Motion to Dismiss: Vindictive or Retaliatory Prosecution (CRM-0050)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the prosecution against the defendant in this case is vindictive or retaliatory, thereby denying the defendant due process and equal protection of the law in violation of the rights guaranteed by U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 1, 3, 6, 7, 8, and 11; and *Alabama v. Smith*, 490 U.S. 794 (1989), *Thigpen v. Roberts*, 468 U.S. 27 (1984), *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), *Blackledge v. Perry*, 417 U.S. 21 (1974), *Sears v. State*, 94 Wis. 2d 128, 287 N.W.2d 785 (1980), and *State v. Minniecheske*, 118 Wis. 2d 357, 347 N.W.2d 610 (Ct. App. 1984).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XX. Motion to Dismiss: Selective or Discriminatory Prosecution [§ 5.33]

Commentary and Instructions for Form 5.33A

Form 5.33A Motion to Dismiss: Selective or Discriminatory Prosecution (CRM-0051)

Form 5.33A, *infra*, is a motion to dismiss based on selective or discriminatory prosecution. It is discriminatory to prosecute someone simply because he or she is of a particular race, color, religion, gender, or other arbitrary classification. Whenever an individual is the only person, or the only person in a particular class or group, to be prosecuted under a criminal statute, the possibility of discrimination arises.

Selective or discriminatory prosecution is difficult to prove. Whenever a new crime is created by the legislature, someone has to be the first person charged. The defense may have to look to patterns of prosecution in the past or other evidence that the defendant is being singled out. *See State v. Kramer*, 2001 WI 132, ¶¶ 14–15, 248 Wis. 2d 1009, 637 N.W.2d 35; *Sears v. State*, 94 Wis. 2d 128, 287 N.W.2d 785 (1980).

The defense has the initial burden to show that the defendant "has been singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based upon an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose)." *Kramer*, 2001 WI 132, ¶ 18, 248 Wis. 2d 1009 (citations omitted). If the defense makes this prima facie showing, the burden shifts to the state to present "compelling evidence" to show a "reasonable basis" for the exercise of prosecutorial discretion. *Id.* ¶ 25 (citations omitted).

> ***Practice Tip.*** This type of motion generally requires substantial research, investigation, or both to show selective or discriminatory enforcement. For example, to determine whether a particular officer or agency discriminates against a racial group, the defense needs data regarding the race of persons stopped, arrested, or charged for similar conduct. The defense also needs to compare this data to the percentage of the persons engaging in the conduct in the relevant geographical area. Despite the difficulties in proving discrimination, however, the data obtained in this type of investigation may be helpful not only to an individual client but also to others in the group that is subject to discrimination.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.33A Motion to Dismiss: Selective or Discriminatory Prosecution (CRM-0051)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the prosecution against the defendant in this case is selective or discriminatory, thereby denying the defendant due process and equal protection of the law in violation of the rights guaranteed by U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 1, 3, 6, 7, 8, and 11; and *State v. Kramer*, 2001 WI 132, 248 Wis. 2d 1009, 637 N.W.2d 35, and *Sears v. State*, 94 Wis. 2d 128, 287 N.W.2d 785 (1980).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXI. Motion to Dismiss: Statute of Limitation [§ 5.34]

Commentary and Instructions for Form 5.34A

Form 5.34A Motion to Dismiss: Statute of Limitation (CRM-0052)

Form 5.34A, *infra*, is a motion to dismiss based on the statute of limitation. Wisconsin has two basic criminal statutes of limitation. Wis. Stat. § 939.74 is the general statute applicable to most crimes. Under this statute, the district attorney must generally begin prosecution within six years for felonies and three years for misdemeanors. Wis. Stat. § 939.74(1). There are no time limits on beginning a prosecution for first-degree or second-degree intentional homicide, first-degree reckless homicide, felony murder, first-degree sexual assault, or certain sexual assaults against children. Wis. Stat. § 939.74(2)(a). The state must begin prosecution for second-degree reckless homicide within 15 years. Wis. Stat. § 939.74(2)(am). The state may begin prosecution for a theft involving misappropriation within 1 year after discovery of the loss, but in no case more than 8 years after the original misappropriation for misdemeanors and 11 years for felonies. *See* Wis. Stat. § 939.74(2)(b).

Prosecution for certain crimes against children must be commenced before the victim reaches age 45, Wis. Stat. § 939.74(2)(c), or age 26, Wis. Stat. § 939.74(2)(cm), depending on the specific offense charged.

If a DNA sample was collected before the expiration of the statutory time period, the state has additional time to commence prosecution of certain sexual assault offenses after obtaining results that link the defendant to the crime. Wis. Stat. § 939.74(2d) (one year from date of identifying test results for most crimes; no time limit for prosecution of crimes listed under Wis. Stat. § 939.74(2)(a)).

Excluded from most time-limit computations are periods when the defendant does not publicly reside in Wisconsin and periods when a prosecution is pending against the defendant for the same act. Wis. Stat. § 939.74(3). Although no published case law has addressed the issue, a strong argument exists that these exclusions do not apply to time limits measured by the age of the alleged victim. Also excluded from computations are some time periods in cases of sexual exploitation by a therapist. *See* Wis. Stat. § 939.74(4).

The second statute of limitation applies to violations of the Wisconsin racketeering activity and continuing-criminal-enterprise laws, Wis. Stat. §§ 946.80–.88. The state must begin prosecution for such violations within six years after a racketeering activity or criminal enterprise terminates. Wis. Stat. § 946.88(1).

> ***Practice Tip.*** Because the statute of limitation previously provided a shorter period of time for certain offenses, the defense attorney should consider a possible ex post facto defense when the defendant's alleged offense occurred after the previous time period expired. *See State v. Haines*, 2003 WI 39, ¶¶ 13–14, 261 Wis. 2d 139, 661 N.W.2d 72. Thus, if a defendant is charged with a sexual assault that allegedly occurred in 1985, the attorney should research whether the defendant has a valid defense on the basis of the previous limitation period.

Distribution

Original: E-file

Copy: Client; client file

Notes

Form 5.34A Motion to Dismiss: Statute of Limitation (CRM-0052)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing this action. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the statute of limitation has expired and further prosecution would be a violation of the rights guaranteed by U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 7 and 8; and Wis. Stat. §*(§)* *(specify appropriate statute of limitation)*.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney's Email Address)

XXII. Motion for Competency Examination [§ 5.35]

Commentary and Instructions for Forms 5.35A–5.35B

Form 5.35A	Defendant's Motion for Competency Examination (CRM-0053)
Form 5.35B	Order for Competency Examination by DHS (CRM-0054)

A defendant has a due-process right to understand the nature of the criminal proceedings and to be mentally able to assist in his or her own defense. *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 321–22, 204 N.W.2d 13 (1973). This right is codified in Wis. Stat. § 971.13(1), which prohibits trial, conviction, or sentencing of a defendant who lacks "substantial mental capacity" to understand the proceedings or assist in the defense.

The defense attorney must notify the court if he or she has reason to doubt the defendant's competency. *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). This requirement is a narrow exception to the ethics rule of confidentiality, SCR 20:1.6, which restricts attorney disclosure of information relating to client representation. *State v. Meeks*, 2003 WI 104, ¶¶ 44–46, 263 Wis. 2d 794, 666 N.W.2d 859. The defense attorney need not disclose specific reasons for doubting competency and is probably prohibited from doing so unless some other exception to confidentiality applies. *See id.* ¶ 46.

> ***Practice Tip.*** Courts still demand information and may decide not to order an examination if they do not see a basis for one. Counsel should be aware that they may need to advocate for a competency evaluation while keeping confidentiality in mind. Citing facts from the criminal complaint may provide the court with a basis to order the evaluation while avoiding any violations of confidentiality.

Form 5.35A, *infra*, is the Defendant's Motion for Competency Examination. The motion is brought pursuant to Wis. Stat. § 971.14, which sets forth detailed procedures for evaluations and later hearings to determine competency. Evaluations may be conducted on either an inpatient or outpatient basis. Wis. Stat. § 971.14(2)(am). Generally, the court will order an outpatient examination for a defendant who is not in custody. *See* Wis. Stat. § 971.14(2)(b) (giving limited circumstances in which inpatient examination may be ordered after defendant has been released on bail). However, for a defendant who has not been released on bond, the "outpatient" examination generally is conducted in the county jail. *See* Wis. Stat. § 971.14(2)(am).

If the court orders a competency examination, it may appoint one or more mental health professionals to examine the defendant and prepare a report. Wis. Stat. § 971.14(2)(a). Most often, the court orders the Department of Health Services (DHS) to conduct the evaluation, in which case the DHS designates the examiner(s). In addition to providing an opinion regarding the competency to proceed, the report must also address (1) whether the defendant needs medication or treatment, and (2) whether the defendant lacks competency to refuse medication or treatment. *See* Wis. Stat. § 971.14(2)(am); *infra* Form 5.35B (Order for Competency Examination by DHS).

After the report is submitted, the court provides both parties the opportunity to present other evidence on the issue of competency. Wis. Stat. § 971.14(4)(b). The precise burden of proof differs, depending on whether the defendant claims to be competent or incompetent, although the state has the burden of persuasion in either case. *See id.*

If the defendant is found incompetent to proceed, the court considers whether the defendant is likely to regain competency during a period of either 12 months or the maximum sentence for the most serious charge. *See* Wis. Stat. § 971.14(5)(a). The court also determines whether the defendant is competent to refuse medication or treatment. Wis. Stat. § 971.14(4)(b). A finding that the defendant is likely to become competent results in a commitment to the DHS for treatment. Wis. Stat. § 971.14(5)(a). Treatment may occur in a state institution, in another locked facility, or in an outpatient setting. *Id*. The treatment staff report to the court every 3 months (and 30 days before expiration of the commitment period). Wis. Stat. § 971.14(5)(b). When the court receives each report, it initiates the procedure to determine the defendant's competency or likelihood to regain competency. *See* Wis. Stat. § 971.14(5)(c).

If the defendant is found incompetent to proceed, the court may also consider the issue of competency to refuse medication or treatment. *See* Wis. Stat. § 971.14(4)(b). If the state proves by clear and convincing evidence that the defendant lacks this competency, the court may order administration of medication or treatment. *Id.*

If the court determines that the defendant is unlikely to become competent during the commitment period, it must discharge the defendant, subject to the option of ordering detention under the civil commitment procedure. Wis. Stat. § 971.14(6)(a), (b).

> ***Practice Tip.*** The defense attorney needs to consider a number of factors in addressing competency issues. Perhaps the most important factor is the attorney's obligation under *Johnson* to inform the court of doubt about the client's competency. Related to this obligation is the caution in *Meeks* that the attorney might not be authorized to disclose any specific information when raising the issue. The attorney should also attempt to "maintain a normal client-lawyer relationship," SCR 20:1.14(a), keeping in mind the options of seeking appointment of a guardian ad litem or taking other protective action only when the lawyer reasonably believes that the client has diminished capacity, cannot adequately act in the client's own interest, and "is at risk of substantial physical, financial or other harm." SCR 20:1.14(b).

Competency can change over time, particularly with delusional clients. These clients may appear highly intelligent and rational most of the time. The attorney may, however, encounter strong delusional thinking that affects competency. Thus, the attorney's obligation under *Johnson* may arise at any time, even after an initial court determination of competency. Conversely, some competency issues relate to the defendant's general level of intelligence, which ordinarily does not change dramatically during the course of representation.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.35A Defendant's Motion for Competency Examination (CRM-0053)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR COMPETENCY EXAMINATION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order for an examination regarding the defendant's competency to stand trial. The defendant brings this motion pursuant to Wis. Stat. §§ 971.13 and 971.14 on the grounds that the defendant's attorney has reason to doubt the defendant's competency. *See State v. Meeks*, 2003 WI 104, ¶¶ 44–46, 263 Wis. 2d 794, 666 N.W.2d 859; *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986).

[IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested,
if attorney determines that further disclosure is
both advisable and permissible under SCR 20:1.6.))

(Also, if applicable, specify facts to support option of
outpatient evaluation as a condition of bond.)]

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

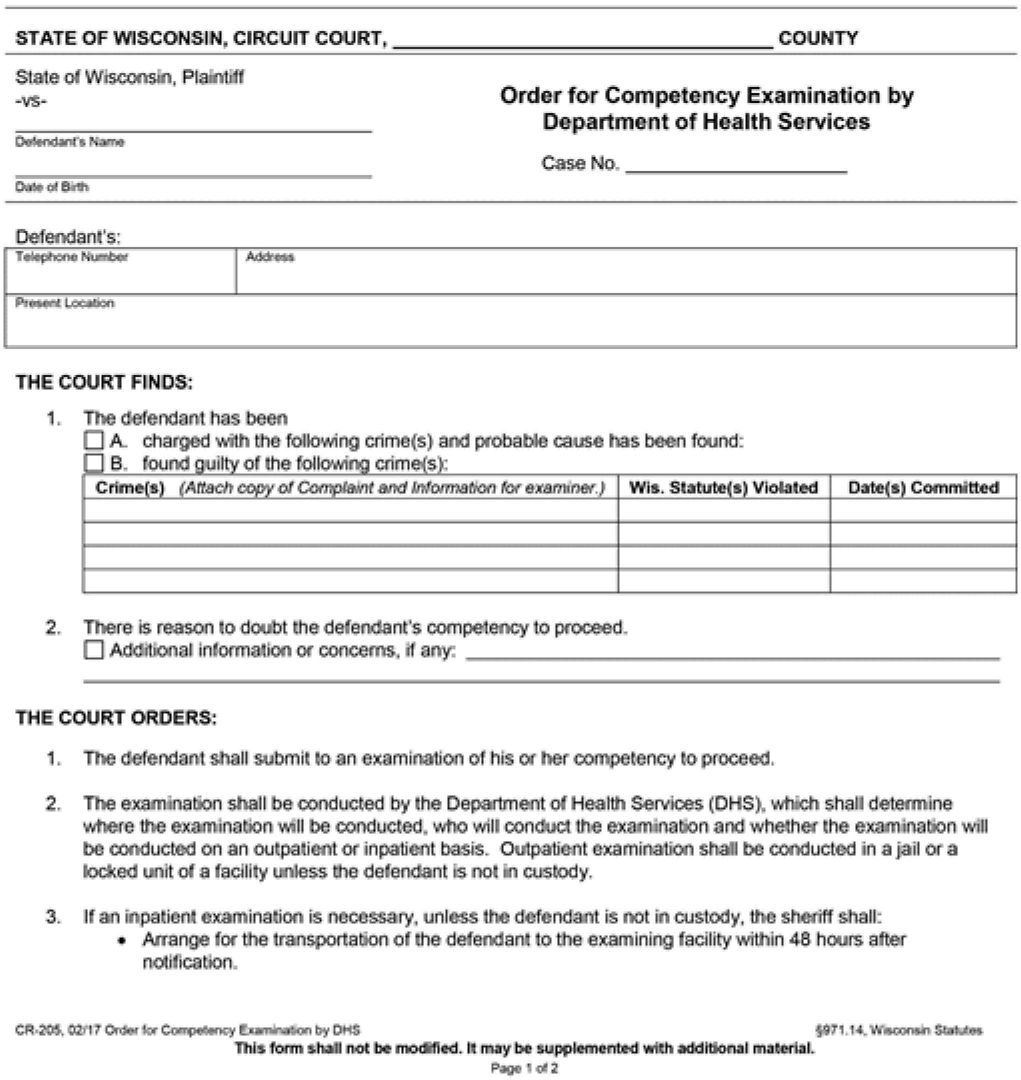
[Type "Electronically signed by"
and your name on this line] ________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.35B Order for Competency Examination by DHS (CRM-0054)

Note. This form is available at https://www.wicourts.gov/forms1/circuit/index.htm.



STATE OF WISCONSIN, CIRCUIT COURT, ______________________ COUNTY

State of Wisconsin, Plaintiff
-vs-
____
Defendant's Name
____
Date of Birth

Order for Competency Examination by Department of Health Services

Case No. ______________

Defendant's:

Telephone Number	Address
Present Location	

THE COURT FINDS:

1. The defendant has been
   ☐ A. charged with the following crime(s) and probable cause has been found:
   ☐ B. found guilty of the following crime(s):

Crime(s) *(Attach copy of Complaint and Information for examiner.)*	**Wis. Statute(s) Violated**	**Date(s) Committed**

2. There is reason to doubt the defendant's competency to proceed.
   ☐ Additional information or concerns, if any: ______________________

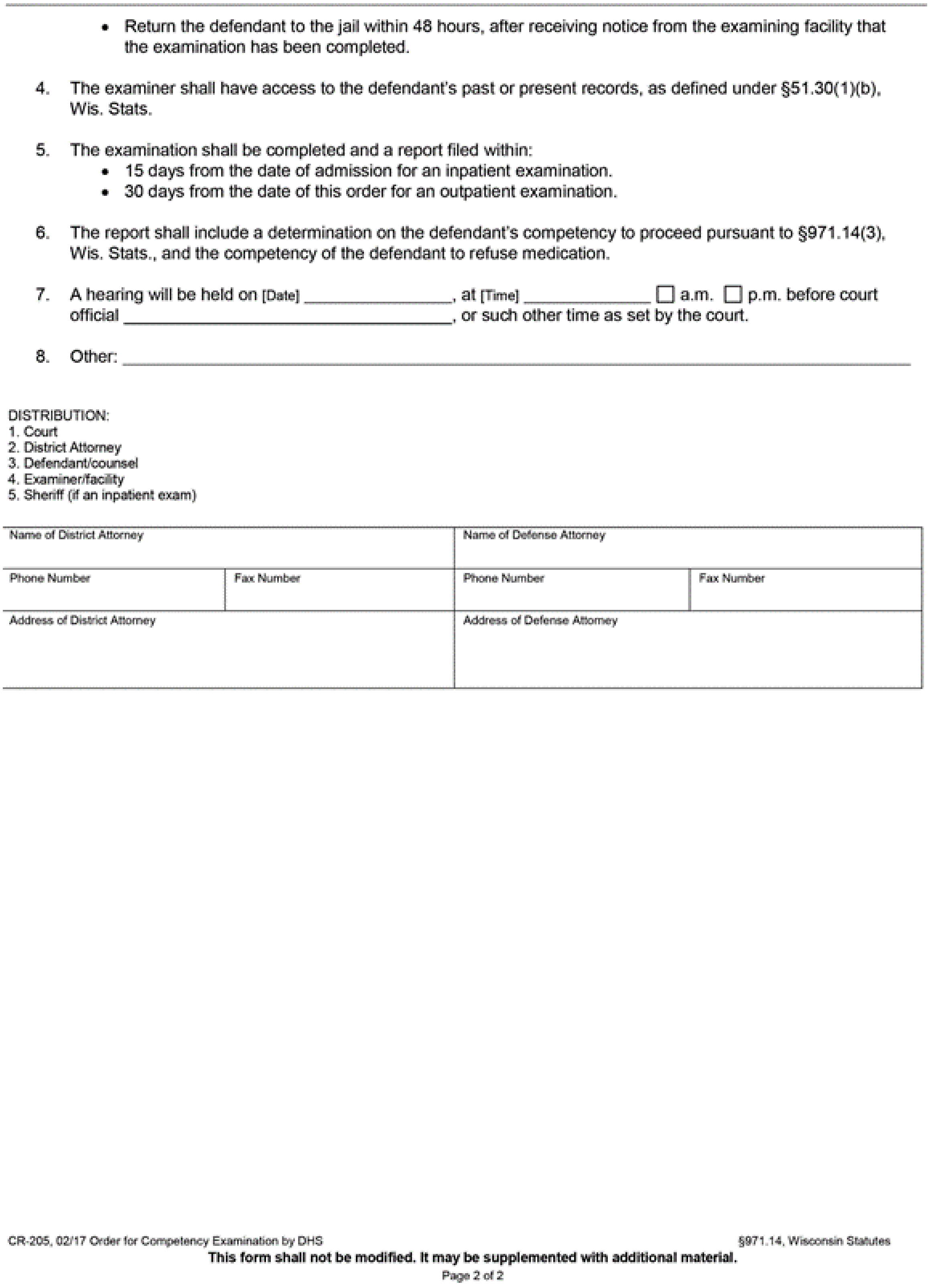
THE COURT ORDERS:

1. The defendant shall submit to an examination of his or her competency to proceed.

2. The examination shall be conducted by the Department of Health Services (DHS), which shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an outpatient or inpatient basis. Outpatient examination shall be conducted in a jail or a locked unit of a facility unless the defendant is not in custody.

3. If an inpatient examination is necessary, unless the defendant is not in custody, the sheriff shall:
   - Arrange for the transportation of the defendant to the examining facility within 48 hours after notification.

CR-205, 02/17 Order for Competency Examination by DHS §971.14, Wisconsin Statutes
This form shall not be modified. It may be supplemented with additional material.
Page 1 of 2



- Return the defendant to the jail within 48 hours, after receiving notice from the examining facility that the examination has been completed.

4. The examiner shall have access to the defendant's past or present records, as defined under §51.30(1)(b), Wis. Stats.

5. The examination shall be completed and a report filed within:
    - 15 days from the date of admission for an inpatient examination.
    - 30 days from the date of this order for an outpatient examination.

6. The report shall include a determination on the defendant's competency to proceed pursuant to §971.14(3), Wis. Stats., and the competency of the defendant to refuse medication.

7. A hearing will be held on [Date] ________________, at [Time] ______________ ☐ a.m. ☐ p.m. before court official ____________________________________, or such other time as set by the court.

8. Other: ____

DISTRIBUTION:
1. Court
2. District Attorney
3. Defendant/counsel
4. Examiner/facility
5. Sheriff (if an inpatient exam)

Name of District Attorney		Name of Defense Attorney	
Phone Number	Fax Number	Phone Number	Fax Number
Address of District Attorney		Address of Defense Attorney	

CR-205, 02/17 Order for Competency Examination by DHS §971.14, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

XXIII. Discovery, Disclosure, and Inspection [§ 5.36]

Commentary and Instructions for Forms 5.36A–5.36B

Form 5.36A	Defendant's Demand for Discovery and Inspection (CRM-0055)
Form 5.36B	Defendant's Motion for Discovery and Inspection (CRM-0056)

Discovery, disclosure, and inspection are essential elements of an adequate defense. The prosecutor has the duty to provide discovery with due diligence. *See State v. DeLao*, 2002 WI 49, ¶ 33, 252 Wis. 2d 289, 643 N.W.2d 480; *Wold v. State*, 57 Wis. 2d 344, 350, 204 N.W.2d 482 (1973). With increasing frequency, district attorneys are providing full discovery through an open-file policy or by simply supplying the defense attorney with copies of the police reports. This policy is a sensible and fair approach to discovery. Nevertheless, the defense attorney should not make the mistake of relying on a policy. Because of the adversarial nature of the U.S. legal system, some prosecutors will provide only the minimum discovery required by law. Failure to file the appropriate discovery demands and motions may result in surprise at trial and, ultimately, in ineffective representation.

Form 5.36A, *infra*, is the basic discovery demand. The defense attorney should delete those paragraphs that are not appropriate to the case.

Paragraph 1 demands copies of the defendant's written or recorded statements pursuant to Wis. Stat. § 971.23(1)(a). The discovery right encompasses all statements in the state's possession or control, not just statements made to law enforcement officers. *Kutchera v. State*, 69 Wis. 2d 534, 545, 230 N.W.2d 750 (1975).

Paragraph 2 demands written summaries of all the defendant's oral statements that the state intends to use during trial. *See* Wis. Stat. § 971.23(1)(b). According to *Kutchera*, the defense is entitled not only to statements made to police, but also to statements made by the defendant to other witnesses. *See Kutchera*, 69 Wis. 2d at 543–45.

Paragraph 3 demands the names and addresses of witnesses to the defendant's written or oral statements. Wis. Stat. § 971.23(1)(d) requires that the witnesses' names and addresses be provided to the defense if the prosecution intends to call them at trial. As to witnesses whom the state does not intend to use at trial, the request for addresses is a logical extension of the statute, although not specifically required.

Paragraph 4 demands that the defendant be provided with a copy of his or her criminal record, if any, pursuant to Wis. Stat. § 971.23(1)(c).

Paragraph 5 demands the names and addresses of all witnesses whom the state intends to call at trial, pursuant to Wis. Stat. § 971.23(1)(d).

Paragraph 6 demands, pursuant to Wis. Stat. § 971.23(1)(e), all written and recorded statements of witnesses whom the state intends to call at trial, including videotaped statements of a child and reports or statements of experts. The discovery statute requires disclosure "within a reasonable time before trial." Wis. Stat. § 971.23(1). The state does not ordinarily need to disclose or summarize oral statements that the witness gave to an investigating officer. *See State v. Nelis*, 2007 WI 58, ¶ 37, 300 Wis. 2d 415, 733 N.W.2d 619. If, however, such oral statements are exculpatory, disclosure is required under Wis. Stat. § 971.23(1)(h), cited in paragraph 11 of the discovery demand.

Paragraph 7 demands, pursuant to Wis. Stat. § 971.23(1)(e), a written summary of the findings or anticipated testimony of any expert who has not prepared a report or statement.

Paragraph 8 demands, pursuant to Wis. Stat. § 971.23(1)(e), the results of any physical examination, mental examination, or scientific test that the state intends to offer at trial. Pursuant to Wis. Stat. § 971.23(9)(b), either party must notify the other party, at least 45 days before trial, of its intent to introduce DNA evidence. This notice triggers a specialized discovery process under this subsection. *See id.*

Paragraph 9 demands the criminal records and juvenile-delinquency records of witnesses the state intends to call in the case. *See* Wis. Stat. § 971.23(1)(f). According to the rule in *Jones v. State*, 69 Wis. 2d 337, 230 N.W.2d 677 (1975), the prosecutor must make a good-faith effort to obtain criminal records for witnesses even when those records are in other jurisdictions. If the prosecutor is alerted to the fact that the defense believes that potential witnesses may have criminal records, the prosecutor has little or no excuse for failing to secure copies of those records. Note that the statute refers to "criminal records," which may well be a much broader term than "criminal convictions." If the defense wants out-of-state or federal criminal records, the attorney should specifically request them. Wis. Stat. § 906.09(1) allows impeachment of witnesses by admission of their adjudications for juvenile delinquency. Thus, the defense attorney should seek discovery of these records, as well as other juvenile records that may be exculpatory. *See infra* commentary on paragraph 11.

Paragraph 10 demands, pursuant to Wis. Stat. § 971.23(1)(g), all physical evidence that the state intends to introduce at trial. Paragraph 10 also demands other physical evidence (not intended for use at trial) in the possession of the state and any investigative agencies. At a minimum, the defense is entitled to have the prosecutor comply with statutory and constitutional obligations to review all such materials and disclose all those that are potentially exculpatory.

Paragraph 11 contains explicit demands for exculpatory evidence, pursuant to Wis. Stat. § 971.23(1)(h). The state has an affirmative duty to disclose to the defense all exculpatory evidence that is material either to guilt or to punishment. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737. The prosecutor must disclose this evidence within a reasonable time before trial (sufficiently in advance of trial for its effective use). *Harris*, 2004 WI 64, ¶ 37, 272 Wis. 2d 80; *cf. State ex rel. Lynch v. County Ct.*, 82 Wis. 2d 454, 463, 262 N.W.2d 773 (1978) (stating, in case predating current discovery statute, that prosecutor must disclose exculpatory material immediately upon recognizing its exculpatory nature).

Paragraph 12 demands that the prosecution provide notice of any conduct of the defendant that the state intends to introduce as evidence against the defendant. The paragraph cites appropriate sections of the rules of evidence. This evidence is commonly referred to as *Whitty* evidence. *See Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

Paragraph 13 demands the names of all witnesses who may have relevant evidence, whether the state intends to call them as witnesses or not. This paragraph is not a demand for a list of witnesses but a demand for access to witnesses who may have exculpatory evidence. The premise is that the district attorney might not realize that the evidence is helpful to the defense. *State v. Simmons*, 57 Wis. 2d 285, 292, 203 N.W.2d 887 (1973), supports the right of the defendant's attorney to interview prosecution witnesses. Also, standard 3-3.1(d) of the ABA's *Standards for Criminal Justice—Prosecution Function and Defense Function* (3d ed. 1993) provides that "[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give." The *Simmons* court adopted the earlier version of this ABA standard, which also favored defense access to witnesses. *Simmons*, 57 Wis. 2d at 292–93.

Paragraph 14 demands all statements of potential witnesses, regardless of whether the state intends to call those witnesses at trial. The rationale supporting paragraph 13, *supra*, applies to this demand as well: the statements may contain exculpatory information that would be apparent to the defense attorney, but not to the prosecutor. Wis. Stat. § 906.13(1) governs disclosure of statements used in examining a witness; disclosure to opposing counsel is required, on demand, after the witness has been examined about the statement. Thus, as to statements of defense witnesses (other than the defendant's statements or exculpatory statements) in possession of the state, there is no statutory right to pretrial disclosure.

Paragraph 15 demands the statements of any alleged co-actor. The defense needs access to these statements for a number of reasons. First, if the alleged co-actors are being tried jointly, the defense needs to know the contents of the statements to decide whether to move for severance under *Bruton v. United States*, 391 U.S. 123 (1968). Second, the statements may contain exculpatory information. *See* Wis. Stat. § 971.23(1)(h). Finally, if the alleged co-actor is a potential witness against the defendant, knowledge of the statement may be crucial for impeaching the witness or preparing a defense. If the alleged co-actor will testify for the prosecution, Wis. Stat. § 971.23(1)(e) mandates disclosure of his or her statements.

Paragraph 16 demands information about promises, rewards, or inducements of any kind made to any witness. For example, the government may promise not to prosecute, to dismiss charges, or to seek a reduced punishment. Incentives may also come from private anticrime or news organizations. The promise of personal or financial rewards can affect the motives of a potential witness.

Paragraph 17 demands copies of previous testimony given by witnesses whom the state intends to call as witnesses at any proceeding. As to trial witnesses, the defense is entitled to discovery under the general provision on witness statements, Wis. Stat. § 971.23(1)(e). If the witness is expected to testify only as to pretrial matters, the prior testimony may still be discoverable as exculpatory evidence. Wis. Stat. § 971.23(1)(h). Also, if the defense is entitled to the prior testimony at a motion hearing, the court may wish to expedite the hearing by allowing counsel adequate time to review the prior testimony.

Paragraph 18 demands access to information that would allow the defense to pursue a motion to suppress identification evidence.

Paragraph 19 demands information that would assist the defense in determining whether to pursue a motion to suppress physical evidence.

Paragraph 20 seeks information about informants. If the state has used an informant, that person may be a potential defense witness or may help to formulate the defense of entrapment.

Paragraph 21 demands information about electronic surveillance.

Form 5.36B, *infra*, is the basic discovery motion. Generally, the defense must make a demand for discovery, disclosure, and inspection. A motion is the method of enforcing the demand, if the prosecution fails to comply. The attorney may combine Forms 5.36A and 5.36B, *infra*, into a single demand and motion.

Depending on the prosecutor's response to the Defendant's Demand for Discovery and Inspection, and on the specific unresolved discovery issues, the defense attorney may wish to supplement the discovery motion before requesting a hearing.

> ***Practice Tip.*** In some counties, the prosecutor may refer the defense attorney to a law enforcement agency for some aspects of discovery, such as copies of recorded statements, copies of photographs, and inspection of physical evidence. This practice may benefit the defense (for example, the defense attorney may learn of evidence that has not been transmitted to the prosecutor). However, such a referral practice does not relieve the prosecutor of his or her statutory duty to provide discovery.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.36A Defendant's Demand for Discovery and Inspection (CRM-0055)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S DEMAND FOR DISCOVERY AND INSPECTION

TO: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* County
(4.02) (Prosecutor's Address)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, demands that the state provide disclosure, inspection, and copying of the items listed below. The defendant makes this demand pursuant to Wis. Stat. § 971.23; U.S. Const. amends. V, VI, and XIV; and Wis. Const. art. I, §§ 1, 7, and 8.

9. All written or recorded statements made by the defendant concerning the alleged crime that are within the state's possession, custody, or control, including the defendant's testimony in any John Doe proceeding under Wis. Stat. § 968.26, or before any grand jury, and the names of witnesses to the defendant's written statements. Wis. Stat. § 971.23(1)(a).

10. A written summary of all oral statements of the defendant that the state plans to use in the course of the trial, and the names of witnesses to the defendant's oral statements. Wis. Stat. § 971.23(1)(b).

11. The addresses of all witnesses to any written or oral statements made by the defendant, identified in paragraphs 1 and 2 above.

12. A copy of the defendant's criminal record, if any. Wis. Stat. § 971.23(1)(c).

13. A list of all witnesses and their addresses whom the state intends to call at trial. Wis. Stat. § 971.23(1)(d).

14. Any and all relevant written or recorded statements of a witness named on a list under paragraph 5, including any and all videotaped oral statements of a child under Wis. Stat. § 908.08 and any reports or statements of experts made in connection with the case. Wis. Stat. § 971.23(1)(e); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468; *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887 (1973); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737.

15. If an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his/her testimony. Wis. Stat. § 971.23(1)(e).

16. The results of any physical or mental examination, scientific test, experiment, or comparison that the state intends to offer in evidence at trial. Wis. Stat. §§ 971.23(1)(e), (9), 906.09(1); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887 (1973); *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).

17. The criminal record and juvenile delinquency adjudications of any and all prosecution witnesses which are known to the state. Wis. Stat. §§ 971.23(1)(f), 906.09; *Jones v. State*, 69 Wis. 2d 337, 230 N.W.2d 677 (1975).

18. Any and all physical evidence that the state intends to offer in evidence at the trial, Wis. Stat. § 971.23(1)(g), as well as all other physical evidence within the possession, custody, or control of the state or its investigative agencies or agents.

19. Any exculpatory evidence, Wis. Stat. § 971.23(1)(h), including but not limited to the following:

    a. All evidence and/or other information that would tend to negate the guilt of the defendant, including laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *State v. Ruiz*, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).

    b. All evidence and/or other information that would tend to affect the weight or credibility of the evidence against the defendant, *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977); including but not limited to the following:

        i. Any statements by any individual that may be inconsistent, in whole or in part, with any other statement relevant to the charge by the same individual;

        ii. Any statements that are inconsistent, in whole or in part, with any statements made by other individuals who have given statements relevant to the charge against the defendant;

        iii. Any statements or findings by any expert(s) that are inconsistent, in whole or in part, with the statement of any other witness, or with any other evidence relevant to the charge against the defendant;

        iv. Laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control, that would tend to affect the weight and credibility of evidence used against the defendant.

    c. Any evidence and/or other information that would tend to mitigate, extenuate, or affect the degree of the offense charged, or the disposition (including sentencing) of the charge against the defendant. *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

   d. Any evidence and/or other information that would form the basis for further investigation by the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

20. Notice of any conduct of the defendant the state intends to introduce as an implied admission, including performance tests ordered by law enforcement or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident pursuant to Wis. Stat. § 904.04, 908.03, or 908.045. *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

21. The names and addresses of all persons known to the state to have witnessed any matter related to this case, whether or not the state intends to call them as witnesses at any hearing or trial in this case. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887 (1973); *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).

22. Copies of all written, recorded, or videotaped statements and a summary of any oral statements made by witnesses, including but not limited to copies of all police reports, showups, notebooks, memo books, and all other documents prepared by the witnesses, whether or not the state intends to call them to testify at any hearing or trial in this case; *State v. Groh*, 69 Wis. 2d 481, 230 N.W.2d 745 (1975); *State v. Van Ark*, 62 Wis. 2d 155, 215 N.W.2d 41 (1974); *Simos v. State*, 53 Wis. 2d 493, 192 N.W.2d 877 (1972), and additionally, any and all correspondence, notes, or memoranda created pursuant to Wis. Stat. § 971.095, including statements of “victim(s)” or witness(es) and any statements concerning possible outcomes, including potential plea agreements and sentencing recommendations. Wis. Stat. § 971.095.

23. Copies of any written or recorded statements and a summary of any oral statements made by any accomplice, co-conspirator, or co-defendant in connection with this case. Wis. Stat. § 971.23(1)(e), (h); *Bruton v. United States*, 391 U.S. 123 (1968); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Groh*, 69 Wis. 2d 481, 230 N.W.2d 745 (1975); *State v. Van Ark*, 62 Wis. 2d 155, 215 N.W.2d 41 (1974); *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973); *Simos v. State*, 53 Wis. 2d 493, 192 N.W.2d 877 (1972).

24. Disclosure of any promises, rewards, or inducements made in connection with this case either explicitly or implicitly, directly or indirectly, to any person or persons by the state or its agents or by any other person or group, including but not limited to hot lines, crime lines, and tip lines, and communications to “victims” and witnesses under Wis. Stat. § 971.095. *Giglio v. United States*, 405 U.S. 150 (1972); *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

25. Copies of any testimony at any grand jury proceeding or any John Doe proceeding pursuant to Wis. Stat. § 968.26, of any person whom the state intends to call as a witness at any hearing or trial in this case. Wis. Stat. § 971.23(1)(e).

26. Copies of all photographs of the defendant and any other persons used in any identification or attempted identification procedure in this case, including photographs of all persons picked out by witnesses in this case; photographs of any lineup or showup in this case, whether or not the defendant took part; the names and addresses of any witnesses to any lineup or showup; and the name and address of any person identified in those identification procedures. *Simmons v. United States*, 390 U.S. 377 (1968).

27. An inventory and copies of all books, papers, documents, photographs, and tangible objects related to this case that the state has within its possession, knowledge, or control or that were obtained from or belong to the defendant, together with the date, time, place, and manner in which these items were obtained. Wis. Stat. § 968.17.

28. Any relevant material or information that has been provided by any informant, including the informant’s identity. *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957).

29. All information concerning any wire, electronic, or oral communications, surveillance, or geolocation of the defendant's person or premises. Wis. Stat. §§ 968.27–.37; Wis. Stat. § 971.23(1)(bm), (11). This request includes but is not limited to transcripts, "body wire" recordings, including pre-surveillance testing and checkout and post-surveillance debriefing, the use of GPS devices, mobile phone tracking, whether known as Stingray, Kingfisher, or any other brand name, ShotSpotter, and other wire, electronic, or oral surveillance information. This request also includes the following:

    a. Copies of any and all reports from any officers who used mobile phone or other tracking devices during the investigation of this case, specifically outlining which tracking devices were used in connection with this case by law enforcement, and, if law enforcement has a nondisclosure agreement with the manufacturer of said device, that the existence and a copy of any such agreement be disclosed to the court and defense counsel.

    b. Specifically, copies of any and all records of training and/or certification and training materials those officers have for the use of the mobile phone or other tracking devices that were used in connection with this case by law enforcement.

    c. Copies of any and all policies, including policies on the application for a warrant and on nondisclosure of the use of mobile phone or other tracking devices, for the law enforcement agencies involved in this case.

    d. Copies of any and all warrants applied for by law enforcement, and granted to law enforcement, during the investigation of this case, regarding using a mobile phone or other tracking device, as well as the returns on all such warrants.

    e. Copies of any and all subpoenas used by law enforcement during the investigation of this case, regarding mobile phone or other tracking devices.

30. Continue to disclose to the defendant, before or during trial, any additional material or the names of additional witnesses discovered by the plaintiff which are subject to discovery, inspection, or production under paragraphs 1–21 above, pursuant to Wis. Stat. § 971.23(7).

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.36B Defendant's Motion for Discovery and Inspection (CRM-0056)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S DEMAND FOR DISCOVERY AND INSPECTION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order requiring the state to provide discovery, disclosure, and inspection of all the items of information and evidence requested in the defendant's demand for discovery and inspection made on *(date discovery demand filed)*. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 1, 7, and 8; and Wis. Stat. §§ 971.23 and 971.31.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXIV. Motion for In Camera Inspection [§ 5.37]

Commentary and Instructions for Form 5.37A

Form 5.37A	Motion for In Camera Inspection (CRM-0057)

A motion for in camera inspection asks the court to review confidential evidence possessed by an agent of the state to determine whether the state should provide it to the defense. This procedure balances the defendant's due-process right to fundamental fairness against the confidentiality interests applicable to the materials in question. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 56–61 (1987). This procedure is limited to confidential, material evidence in the state's possession; that is, it does not extend to privately held, privileged records. *See State v. Johnson*, 2023 WI 39, ¶¶ 25–27, 407 Wis. 2d 195, 990 N.W.2d 174.

When seeking in camera inspection, the defense must also consider whether a statute or constitutional provision grants absolute authority to shield files from all eyes. *Compare Ritchie*, 480 U.S. at 58–59, *with Johnson*, 2023 WI 39, ¶¶ 40–46, 407 Wis. 2d 195.

Before bringing the motion, the attorney should determine whether the materials are available through other means, such as a standard discovery demand, an authorization to use and disclose protected health information, a waiver of confidentiality, or a public records request. These alternatives are preferable because, if successful, they provide the attorney with direct access to the materials. The in camera inspection may result in the judge denying or limiting access. The motion for in camera inspection of privileged documents should be the defense attorney's last step in pretrial discovery after exhausting other options and after developing information to show the potential relevance of the documents.

Form 5.37A, *infra*, is a motion for in camera inspection of potential evidence. The attorney should specify the materials sought, their potential relevance to the defense, and the defense's inability to obtain the same or equivalent evidence by other means.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.37A Motion for In Camera Inspection (CRM-0057)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR IN CAMERA INSPECTION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order requiring the state to produce, for the purpose of an in camera inspection, pursuant to Wis. Stat. § 971.23(6m), the following: *(specify materials that should be produced)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the materials may contain relevant and exculpatory evidence, which the defendant has a due-process right to discover before trial under U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. § 971.23(1); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56-61 (1987), and *State v. Johnson,* 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XXV. Motion for Psychological Examination of Complaining Witness [§ 5.38]

This motion has been removed by the authors.

Form 5.38A Defendant's Motion for Psychological Examination of Complaining Witness (CRM-0058)

This motion has been removed by the authors.

XXVI. Motion for Testing by State Crime Laboratory [§ 5.39]

Commentary and Instructions for Forms 5.39A–5.39B

Form 5.39A	Motion for Testing by State Crime Laboratory (CRM-0059)
Form 5.39B	Order for Testing by Crime Laboratory on Behalf of Defendant (CRM-0060)

Form 5.39A, *infra*, is a motion for testing by the State Crime Laboratory pursuant to Wis. Stat. § 165.79. In a felony case, the defense may ask the court to order testing of evidence on the defendant's behalf. Wis. Stat. § 165.79(1). The prosecution is not entitled to receive the results of this testing unless the defense introduces the results at the preliminary hearing or intends to use the results at trial; the defense's intent to use the results triggers the discovery statute's provision giving the prosecution the right to the results. *See id.*; Wis. Stat. § 971.23(2m)(am).

This motion is appropriate to request testing of such items as blood samples, weapons, bullets, and objects that may have DNA or fingerprint evidence. If the crime laboratory's analysis is favorable, the defense can present that evidence as part of negotiations or at trial. *See* Wis. Stat. § 165.79(1) (on reasonable notice, laboratory employees who performed analyses must appear at trial). Furthermore, because the statute requires confidentiality for tests done at the defendant's request, the prosecution cannot use an unfavorable test result against the defendant. *Id.*

> ***Practice Tip.*** The defense's decision to request testing generally will follow a review of discovery materials, an independent investigation of the pertinent facts, and consultation with the client. Thus, it may be difficult to make an informed decision within the presumptive statutory period for filing motions. *See* Wis. Stat. § 971.31(5)(a) (pretrial motions shall be filed within 10 days after arraignment in a felony case "unless the court otherwise permits"). The defense attorney should be prepared to argue for expanding the 10-day period depending on the timing of discovery, the complexity of the case, and other pertinent circumstances. If the defense is diligent and presents the request for testing a reasonable time before trial, the court is likely to consider the request on its merits.

The defense attorney should submit Form 5.39B, the Order for Testing by State Crime Laboratory on Behalf of Defendant, *infra*, with the motion for testing. If the court grants the motion, the signed order should be provided to both the State Crime Laboratory and the agency (or individual) in possession of the evidence. The attorney should ensure that all parties understand that the Crime Laboratory's report should go directly to the attorney and not to the court, the prosecutor, or law enforcement.

The three Wisconsin crime labs and their service areas are as follows:

Wisconsin State Crime Laboratory—Madison
4626 University Ave.
Madison, WI 53705
(608) 266-2031
Serves 24 counties in central and western Wisconsin and serves the northern 40 counties for testing not available through the Wausau laboratory.

Wisconsin State Crime Laboratory—Milwaukee
1578 S. 11th St.
Milwaukee, WI 53204

(414) 382-7500
Serves the following eight counties: Kenosha, Milwaukee, Ozaukee, Racine, Sheboygan, Walworth, Washington, and Waukesha.

Wisconsin State Crime Laboratory—Wausau
7100 Stewart Ave.
Wausau, WI 54401
(715) 845-8626
Serves the northern 40 counties for analysis related to controlled substances, fingerprints, footwear, and digital imaging; other analyses for the northern counties are conducted at the Madison lab.

Distribution

Form 5.39A
Original: E-file
Copy: Client; client file

Form 5.39B (proposed)
Original: E-file
Copy: Client; client file

Form 5.39B (signed)
Original: E-file
Copy: Client; custodian of the evidence; crime laboratory; client file

Notes

Form 5.39A Motion for Testing by State Crime Laboratory (CRM-0059)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR TESTING BY STATE CRIME LABORATORY

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge this court's jurisdiction, moves the court for an order for testing of *(describe evidence)* by the State Crime Laboratory on behalf of the defendant. The defendant brings this motion pursuant to Wis. Stat. § 165.79 on the grounds that the requested testing is likely to provide probative evidence in this case.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney’s Email Address)

Form 5.39B Order for Testing by Crime Laboratory on Behalf of Defendant (CRM-0060)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________ Case No. *(1.02)*

Defendant

____

Date of Birth

ORDER FOR TESTING BY CRIME LABORATORY
ON BEHALF OF DEFENDANT

Defendant's:

Telephone Number	Address
Present Location	

THE COURT FINDS:

The defendant has presented a Motion for Testing by State Crime Laboratory seeking an order for testing of *(describe evidence)*. This evidence is in the possession of *(specify agency or individual)*, and the requested testing may produce probative evidence in this case. Therefore, testing on behalf of the defendant is appropriate pursuant to Wis. Stat. § 165.79.

THE COURT ORDERS:

1. *(Agency or individual)* shall promptly, upon receipt of this Order, deliver *(describe evidence)* to the State Crime Laboratory.

2. Upon receipt of *(describe evidence)*, the State Crime Laboratory shall test *(describe evidence)* on behalf of the defendant.

3. The testing described in paragraph 2 shall determine or attempt to determine *(describe purpose of testing, for example to determine whether DNA sample matches defendant)*.

4. The State Crime Laboratory shall provide to the defendant's attorney a confidential report of the testing pursuant to this Order.

5. The State Crime Laboratory shall return *(describe evidence)* to *(specify agency or individual)* upon completion of the testing.

6. Other: ____

-

-

Distribution:
1. Court-Original
2. District Attorney
3. Defense Attorney
4. Agency or Individual
   Possessing Evidence
5. State Crime Laboratory

XXVII. Disclosure of Witnesses and Response to State's Demand for Discovery [§ 5.40]

Commentary and Instructions for Forms 5.40A–5.40B

Form 5.40A	Defendant's Response to State's Discovery Demand (CRM-0061)
Form 5.40B	Letter Specifying Discovery Materials Provided to State (CRM-0062)

The reciprocal discovery statute entitles each party to demand a list of the witnesses whom the other side intends to call at trial. Wis. Stat. § 971.23(1)(d), (2m)(a). Form 5.36A, *supra*, the Defendant's Demand for Discovery and Inspection, contains the standard statutory demand for names and addresses of the prosecution's witnesses. This section of commentary and instructions summarizes the issues regarding rebuttal witnesses, impeachment witnesses, witnesses whose addresses are unknown, and witnesses who might not be called. It also provides instructions regarding Form 5.40A, Defendant's Response to State's Discovery Demand, *infra*, and Form 5.40B, Letter Specifying Discovery Materials Provided to State, *infra*.

Wis. Stat. § 971.23(1)(d) and (2m)(a) allows the respective parties to exclude from their witness lists rebuttal witnesses and witnesses called solely for impeachment. This type of exclusion has been held unconstitutional as applied to witnesses the prosecution intends to call to rebut the testimony of alibi witnesses listed under Wis. Stat. § 971.23(8). *See Caccitolo v. State*, 69 Wis. 2d 102, 116–18, 230 N.W.2d 139 (1975) (citing *Allison v. State*, 62 Wis. 2d 14, 214 N.W.2d 437 (1974)).

Given the requirement that the defense reveal its witnesses, the defense has a strong argument that due process requires the state to reveal, upon demand, the names and addresses of rebuttal and impeachment witnesses, regardless of whether an alibi defense is at issue. *See Wardius v. Oregon*, 412 U.S. 470, 476 (1973). *But see Lunde v. State*, 85 Wis. 2d 80, 91, 270 N.W.2d 180 (1978); *State v. Sandoval*, 2009 WI App 61, ¶¶ 30–33, 318 Wis. 2d 126, 767 N.W.2d 291 (holding that, although testimony of prosecution witness may have been "appropriate" for case-in-chief, witness was a legitimate rebuttal witness because he contradicted defendant's testimony); *State v. Konkol*, 2002 WI App 174, ¶ 1, 256 Wis. 2d 725, 649 N.W.2d 300 (holding that prosecution not required to disclose rebuttal witness, even if prosecutor expects, before trial, to call witness). By raising this issue, however, the defense runs the tactical risk that the court may also order the defense to reveal its rebuttal and impeachment witnesses.

The defense attorney should also make a record of when the witness first spoke with the police or the prosecution and when the witness was subpoenaed. If the evidence supports a finding of unfair prejudice or surprise, the appropriate remedy is for the court to suppress the witness's testimony. *See Caccitolo*, 69 Wis. 2d at 118. If the evidence shows a failure to comply with discovery, exclusion of the witness's testimony is mandatory, absent good cause. Wis. Stat. § 971.23(7m)(a).

In responding to the demand for a list of witnesses, some prosecutors submit a list that includes every possible witness. The Wisconsin Supreme Court has condemned this practice, stating that the prosecutor must submit a list of the witnesses that the state actually intends to call, not a list of every conceivable witness. *Irby v. State*, 60 Wis. 2d 311, 320, 210 N.W.2d 755 (1973). If the state does not wish to comply with the defense's demand for a list of witnesses, it must move for a protective order under Wis. Stat. § 971.23(6), denying, deferring, or restricting the list of witnesses.

Form 5.40A, *infra*, is the form for the defendant's response to the state's discovery demand. The statute requires that the list include the names and addresses of all persons the defense intends to call as witnesses at trial except for the defendant, rebuttal witnesses, and witnesses called for impeachment purposes only. If the defense does not know the name of a witness, the attorney should indicate this lack of knowledge and should include some description of the person. If the attorney does not know the witness's address, but does know some general location, that information should be included.

The defense attorney ordinarily is not required to disclose attorney notes, investigator notes, or summaries of a witness's oral conversation with the attorney or investigator. *State v. Hereford*, 195 Wis. 2d 1054, 1075–76, 537 N.W.2d 62 (Ct. App. 1995). These materials do not constitute the "written or recorded statement," Wis. Stat. § 971.23(2m)(am), of the witness interviewed by the defense. Also, because the investigator for the defense is typically a potential impeachment witness, the defense does not need to disclose his or her reports before trial. *See* Wis. Stat. § 971.23(2m)(a), (am) (impeachment witnesses exempted from discovery). If, however, the defense investigator reads reports or notes back to the witness (with the witness acknowledging their accuracy) or has the witness sign them, the reports or notes are then discoverable witness statements.

> ***Note.*** If the defense attorney examines a witness at trial about a conversation with the defense investigator, the attorney must disclose the investigative report summarizing the conversation on the prosecutor's request. *See* Wis. Stat. § 906.13(1); *Hereford*, 195 Wis. 2d at 1076–77. Similarly, if the investigator testifies to impeach a witness, the investigative report becomes discoverable under Wis. Stat. § 906.13(1), as do the investigator's relevant notes. *See State v. Groh*, 69 Wis. 2d 481, 485, 230 N.W.2d 745 (1975).

The court may require pretrial disclosure of specific prior acts of the defendant or of a witness that the parties may introduce at trial. *State v. McClaren*, 2009 WI 69, ¶¶ 36–39, 318 Wis. 2d 739, 767 N.W.2d 550. This authority stems from the court's general authority under Wis. Stat. § 906.11 to control the presentation of evidence to ensure that the jury hears reliable and admissible evidence. *Id.* ¶ 3.

Pursuant to Wis. Stat. § 971.23(7), each party has a continuing obligation to notify the opposing party promptly of any additional witnesses or other discoverable material. Thus, if the defense decides, after submitting an original witness list, to call other witnesses, the attorney must promptly disclose their names and addresses in a supplemental response.

The defendant's response to the discovery demand must also include statements of defense witnesses named in the list of witnesses, a written summary of the findings or anticipated testimony of any defense expert who has not prepared a report or statement, the criminal record of any defense witness (other than the defendant), and any physical evidence intended for use at trial. Wis. Stat. § 971.23(2m).

Form 5.40B, Letter Specifying Discovery Materials Provided to State, *infra*, serves as a cover letter to accompany Form 5.40A (Defendant's Response to State's Discovery Demand), *infra*. The letter provides a record of the specific documents furnished to the prosecutor, thus protecting the defense against claims at trial that the defense failed to provide discovery materials.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.40A Defendant's Response to State's Discovery Demand (CRM-0061)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ________________________, Case No. *(1.02)*

Defendant

DEFENDANT'S RESPONSE TO STATE'S DISCOVERY

TO: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* County
(4.02) (Prosecutor's Address)

Pursuant to Wis. Stat. § 971.23(2m)(a), the defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, furnishes the following list of names and addresses of the persons the defendant intends to call as witnesses at trial.

(List the names and addresses of all persons the defense intends to call as witnesses at trial.)

Pursuant to Wis. Stat. § 971.23(2m)(am), (b), and (c), the defendant has also provided all discoverable material known to defense counsel, subject to the attorney-client privilege, the work-product doctrine, ethics requirements governing confidentiality, and any other exceptions to the disclosure provisions of Wis. Stat. § 971.23(2m). The defense attorney acknowledges the duty to promptly supplement this response pursuant to Wis. Stat. § 971.23(7).

Dated: __________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]

____

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.40B Letter Specifying Discovery Materials Provided to State (CRM-0062)

(District Attorney)
(District Attorney's Address)

Re: State v. __________, Case No. *(1.02)*

Dear *(District Attorney's Name)*:

In response to the State's Discovery Demand in the above case, enclosed please find the Defendant's Response to State's Discovery Demand.

The defense has no additional discoverable materials.

(or)

Enclosed are the following discoverable materials, in addition to the Defendant's Response to State's Discovery Demand:

Witness Statements	**Number of pages**
(Witness name)[1] ______________	______________
______________	______________
Summary of Expert's Findings or Anticipated Testimony	**Number of pages**
(Expert's name) ______________	______________
______________	______________
Results of Examinations or Tests	**Number of pages**
(Describe exam or test) ______________	______________
Criminal Record of Witnesses	**Number of pages**
(Name) ______________	______________
______________	______________
Physical Evidence	**Number of pages**
(Description of evidence) ______________	______________
______________	______________

[1] If providing multiple statements of the same witness, the defense attorney should identify each statement by date or other distinguishing characteristic.

[2] If the materials are items other than photocopied documents, the defense attorney should provide a description of each and offer the opportunity for the prosecutor to inspect the items.

Please contact me immediately if you have any questions regarding the above referenced materials or other discovery issues.

(2.03) (Firm/Office Name)
Attorneys for the Defendant

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Encl.

c: *(Client)*

XXVIII. Motion Seeking Clarification or Specificity in Charging Documents [§ 5.41]

Commentary and Instructions for Forms 5.41A–5.41B

Form 5.41A	Motion for Bill of Particulars (CRM-0063)
Form 5.41B	Motion to Make More Definite and Certain (CRM-0064)

Forms 5.41A and 5.41B, *infra*, are motions seeking clarification or specificity in the charging documents. Often, the charging document is unclear or lacks sufficient detail to determine exactly which crime the defendant is charged with committing or when the defendant is alleged to have committed it.

A defendant has due-process and Sixth Amendment rights to fair notice of the charges and a fair opportunity to defend himself or herself. *See State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). The accused is therefore entitled to notice of the specific charge, to enable him or her to prepare a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *State v. Van Bronkhorst*, 2001 WI App 190, ¶ 15, 247 Wis. 2d 247, 633 N.W.2d 236. If a criminal complaint does not contain sufficient detail for a defendant to determine whether it states an offense to which he or she is able to plead and prepare a defense, it may be the subject of a motion to dismiss, such as Form 5.23A, *supra*, or alternatively a motion seeking more specificity, such as Form 5.41A or 5.41B, *infra*. When the date of the crime is not a material element of the offense charged, however, it need not be precisely alleged. *Fawcett*, 145 Wis. 2d at 250.

In *Fawcett*, the court of appeals set forth seven factors to determine (1) whether the complaint states an offense to which the defendant is able to plead and prepare a defense, and (2) whether conviction or acquittal is a bar to another prosecution for the same offense. These factors are (a) the age and intelligence of the alleged victim and other witnesses, (b) the surrounding circumstances, (c) the nature of the alleged offense, (d) the length of the alleged time period relative to the number of offenses, (e) the time between that period and the defendant's arrest, (f) the alleged time between the offense and the date of the complaint, and (g) the ability of the victim or complaining witness to particularize the date and time of the offense. *Id.* at 253. Courts are not confined solely to the seven *Fawcett* factors and may consider any relevant factors "helpful in determining whether a complaint is sufficient to satisfy due process." *State v. Kempainen*, 2015 WI 32, ¶ 28, 361 Wis. 2d 450, 862 N.W.2d 587.

Form 5.41A, *infra*, asks the court to order the state to specify certain information, such as the date, place, and time of the alleged offense. Form 5.41B, *infra*, asks for a court order requiring the state to clarify the charges in the complaint.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.41A Motion for Bill of Particulars (CRM-0063)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION FOR BILL OF PARTICULARS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order requiring the state to specify the following information, all of which is necessary for the defendant to properly prepare a defense and which has not been adequately alleged in the *(complaint/information/indictment)*:

(Specify information required, e.g., date, place,
and time of alleged offense(s); identity of
complainant, alleged victim, or informant.)

The defendant brings this motion pursuant to U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 1, 6, 7, and 8; Wis. Stat. §§ 968.01–.03 and 971.31(2) and (5); and *State v. Van Bronkhorst*, 2001 WI App 190, 247 Wis. 2d 247, 633 N.W.2d 236.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney’s Email Address)

Form 5.41B Motion to Make More Definite and Certain (CRM-0064)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO MAKE
MORE DEFINITE AND CERTAIN

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order requiring the district attorney to make *(indicate paragraph number or portion of complaint that is unclear)* more definite and certain and, in particular, to allege precisely in what manner the defendant is alleged to have *(specify the offense(s) needing clarification)*. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 1, 6, 7, and 8; Wis. Stat. §§ 968.01–.03 and 971.31(2) and (5); and *State v. Van Bronkhorst*, 2001 WI App 190, 247 Wis. 2d 247, 633 N.W.2d 236.

AS GROUNDS, the defendant asserts that this information is necessary so the defendant can plead to the charge and prepare a defense.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney's Email Address)

XXIX. Notice of Alibi [§ 5.42]

Commentary and Instructions for Form 5.42A

Form 5.42A	Notice of Alibi (CRM-0065)

Form 5.42A, *infra*, is a notice of alibi. Wis. Stat. § 971.23(8) requires the defendant to give notice to the district attorney of the intent to rely on an alibi defense. The notice must state the place where the defendant claims to have been when the crime was allegedly committed, along with the names and addresses of witnesses to the alibi. If a witness's name or address is unknown, the defense attorney should so state and should provide whatever descriptive information is available. The defense must list all witnesses who may be called to testify concerning the alibi. Failure to list a witness may preclude the defense from calling the witness at trial. It is not necessary to summarize witnesses' testimony.

The notice of alibi must be given at the arraignment or at least 30 days before trial. Wis. Stat. § 971.23(8)(a). For cause, the court may enlarge the time limit for filing the notice. Wis. Stat. § 971.23(8)(c). Failure to file the notice of alibi precludes the defense from presenting the alibi defense, unless the court orders otherwise on an adequate showing of cause. Wis. Stat. § 971.23(8)(b); *see State v. Burroughs*, 117 Wis. 2d 293, 344 N.W.2d 149 (1984). Exactly what constitutes an adequate showing of cause is not clear. The court may decide to adjourn the trial, with time for both sides to prepare for the alibi defense. *See State v. Wild*, 146 Wis. 2d 18, 429 N.W.2d 105 (Ct. App. 1988).

Within 20 days after receiving the notice of alibi, or at such other time as the court orders, the district attorney must furnish the defendant with written notice of the names and addresses, if known, of any witnesses the state intends to use to rebut the alibi. Wis. Stat. § 971.23(8)(d). Failure to provide a list of rebuttal witnesses may preclude the use of any rebuttal evidence unless the court, for cause, orders otherwise. *Id.* The state must include in its list of rebuttal witnesses the names and addresses of all witnesses who will testify, at any time during the trial, that the defendant was at the scene of the crime. *See Tucker v. State*, 84 Wis. 2d 630, 639 n.5, 267 N.W.2d 630 (1978); *see also Caccitolo v. State*, 69 Wis. 2d 102, 230 N.W.2d 139 (1975); *Allison v. State*, 62 Wis. 2d 14, 30–31, 214 N.W.2d 437 (1974). *But see State v. Kent*, 107 Wis. 2d 378, 379–80, 319 N.W.2d 508 (Ct. App. 1982) (holding that state was not required to list alleged victim whom criminal complaint referenced as having identified defendant at crime scene).

If the defense does not present the alibi defense at trial, the state cannot comment on this failure in any manner nor may the state call any of the alibi witnesses for the purpose of impeaching the defendant's credibility regarding the alibi notice. Wis. Stat. § 971.23(8)(a).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.42A Notice of Alibi (CRM-0065)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S NOTICE OF ALIBI

TO: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* County
(4.02) (Prosecutor's Address)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, hereby provides notice, pursuant to Wis. Stat. § 971.23(8), that *(he/she)* intends to rely on an alibi. More particularly, at the time the crime is alleged to have been committed, *(he/she)* was at *(give alibi, specifying the place where the defendant claims to have been when the crime was allegedly committed)*.

The following persons are witnesses who may testify in support of the alibi:

(List alibi witnesses, including names and addresses, if known.)

Further, the defendant asserts that the above list of witnesses is complete at this time, but *(he/she)* is continuing to search for other witnesses and will disclose their identities as they become known to *(him/her)*.

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XXX. Motion to Compel Disclosure of Confidential Informant [§ 5.43]

Commentary and Instructions for Forms 5.43A–5.43B

Form 5.43A	Motion to Compel Disclosure of Confidential Informant (CRM-0066)
Form 5.43B	Affidavit in Support of Motion to Compel Disclosure of Confidential Informant (CRM-0067)

Form 5.43A, *infra*, is a motion to compel disclosure of a confidential informant. The principal case on this point in Wisconsin, *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), indicates that the defense may be entitled to this information. If the state is unwilling to provide information ordered by the court, the state may have to forgo the prosecution of the defendant. *See id.* at 127, 135–36. *Outlaw* indicates that, to invoke the procedure for an in camera hearing, the defense must show that the informant's testimony may be necessary for a fair trial. *Id.* at 125. Although *Outlaw* does not explicitly require an affidavit in support of the motion, an affidavit is an effective means of summarizing the factual basis for seeking disclosure. *See infra* Form 5.43B.

A thorough understanding of Wis. Stat. § 905.10 and *Outlaw* is essential when pursuing a motion to compel disclosure of a confidential informant. The defense attorney may also need to educate the district attorney and the judge on the law and on the difficulties of presenting a defense in a case in which the only witnesses may be the law enforcement officer, the defendant, and the informant.

The hearing on this motion can be complicated, involving countervailing affidavits, in camera examinations, and sealed records. The defense initially bears the burden to show that the informant can give testimony relevant to the defense. As grounds for the motion, the defense should state why it must have knowledge of, and access to, the informant to prepare its case. For example, the defense might argue that the informant's testimony is necessary to a fair determination of the defendant's guilt or innocence because of the informant's active role in the events leading up to the alleged offense or because of the informant's presence during the alleged offense.

Once the defense has met its burden of showing the necessity of disclosure, the burden shifts to the state to produce evidence showing that the informant's testimony would not be helpful to the defense. *Outlaw*, 108 Wis. 2d at 126. After consideration of the state's response, the court makes a discretionary decision "whether there is a 'reasonable probability' that the informer can give the testimony necessary to a fair determination." *Id.* at 127–28.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.43A Motion to Compel Disclosure of Confidential Informant (CRM-0066)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF CONFIDENTIAL INFORMANT

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order compelling the prosecution to disclose the identity and location of all unnamed or confidential informants relied on or otherwise used by the state or any of its agents in this case. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 1, 7, and 8; Wis. Stat. §§ 905.10 and 971.31(2) and (5); and *McCray v. Illinois*, 386 U.S. 300 (1967), *Roviaro v. United States*, 353 U.S. 53 (1957), and *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982).

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.43B Affidavit in Support of Motion to Compel Disclosure of Confidential Informant (CRM-0067)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF CONFIDENTIAL INFORMANT

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(2.01) (Attorney Handling Case), being sworn, states as follows:

1. I am the attorney for the defendant.
2. I make this affidavit in support of the defendant's motion to compel disclosure of all confidential informants used by the prosecution in this case.
3. *(State the facts supporting the motion, using the first person "I.")*
4.

/s/
(2.01) (Attorney Handling Case))

State Bar No. *(2.02)*

Signed and sworn to before me
on ______________ *(date)* ______________

by ______________________________

/s/
Notary Public, State of Wisconsin
My commission ____________________

☐ This notarial act involved the use of communication technology.

XXXI. Motion to Suppress: Basic Form [§ 5.44]

Commentary and Instructions for Form 5.44A

Form 5.44A Motion to Suppress: Basic Form (CRM-0068)

Motions to suppress are technically motions to exclude evidence under what is known as the exclusionary rule. Under the exclusionary rule, evidence obtained by the state or its agents as a result of conduct exceeding the state's constitutional authority generally cannot be used to support a criminal conviction. *See Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (physical evidence); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (confession).

In *State v. Felix*, 2012 WI 36, ¶ 39, 339 Wis. 2d 670, 811 N.W.2d 775, the Wisconsin Supreme Court described the exclusionary rule as follows: "The purposes of the exclusionary rule are to deter police misconduct and ensure judicial integrity by refusing to rely on evidence obtained through police misconduct."

In deciding whether to apply the exclusionary rule in a specific context, courts balance the incremental deterrent effect against the social cost of excluding reliable evidence. "The laudable goal of deterring police misconduct is not pursued at all costs. As this court noted in its analysis of the good faith exception to the exclusionary rule, there are 'substantial social costs' associated with excluding relevant evidence." *Id.*; *see also State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis. 2d 86, 700 N.W.2d 899. Courts should also consider whether applying the exclusionary rule furthers the purpose behind the law violated. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *Felix*, 2012 WI 36, ¶ 40, 339 Wis. 2d 670 (citing *New York v. Harris*, 495 U.S. 14, 17 (1990)) (suppressing evidence obtained from defendant outside the home following a violation of *Payton v. New York*, 445 U.S. 573 (1980), does not further the purpose of the *Payton* rule, which was designed to protect the physical integrity of the home; it was not intended to grant protection for statements made outside a home's premises when the police have probable cause to arrest the suspect for committing a crime).

Even if the state has violated the law, evidence may nonetheless be admissible under the attenuation doctrine. The general test regarding the scope of the exclusionary rule is "whether the evidence objected to has come at the 'exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint.'" *State v. Phillips*, 218 Wis. 2d 180, 205–06, 577 N.W.2d 794 (1998) (quoting *State v. Anderson*, 165 Wis. 2d 441, 447–48, 477 N.W.2d 277 (1991)); *see also State v. Anson*, 2005 WI 96, ¶ 17, 282 Wis. 2d 629, 698 N.W.2d 776 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). Otherwise excludable evidence may be admissible under the inevitable-discovery doctrine and does not require a showing by the state that the police acted in good faith when committing the constitutional violation. *State v. Jackson*, 2016 WI 56, ¶ 70, 369 Wis. 2d 673, 882 N.W.2d 422 (holding that if state can prove inevitable discovery, state need not prove absence of bad faith).

In litigating suppression issues in search-and-seizure cases, the defense attorney should also anticipate possible prosecution arguments that suppression is not appropriate under the good-faith exception adopted by state and federal courts. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 139–47 (2009); *United States v. Leon*, 468 U.S. 897 (1984); *State v. Blackman*, 2017 WI 77, ¶¶ 6, 68–74, 377 Wis. 2d 339, 898 N.W.2d 774 (holding that good-faith exception not applicable in cases of deliberate, reckless, or grossly negligent conduct, or recurring or systemic error, based on court's conclusion that without suppression under such instances, the deterrent effect of the exclusionary rule on law enforcement misconduct would be frustrated); *State v. Eason*, 2001 WI 98, ¶ 27, 245 Wis. 2d 206, 629 N.W.2d 625; *State v. Robinson*, 2009 WI App 97, ¶ 10, 320 Wis. 2d 689, 770 N.W.2d 721, *aff'd on other grounds*, 2010 WI 80, 327 Wis. 2d 302, 768 N.W.2d 463.

Suppression may be available as a remedy for a statutory violation even if the statute does not specifically provide for this remedy. *See State v. Popenhagen*, 2008 WI 55, ¶¶ 57–70, 309 Wis. 2d 601, 749 N.W.2d 611. The circuit court may suppress evidence "to achieve the objectives of the statute." *Id.* ¶ 62. The court's decision to suppress is discretionary, in light of the statutory objectives and the facts of the case. *See id.* ¶ 68. *But see State v. Minett*, 2014 WI App 40, ¶¶ 9–10, 353 Wis. 2d 484, 846 N.W.2d 831 (holding that suppression is not a remedy for violation of Wis. Stat. § 968.255).

Form 5.44A, *infra*, is the basic form for a motion seeking suppression of evidence. Forms 5.45A–5.47A, *infra*, are the most common motions in this genre. The defense should not limit itself to these motions, however. For example, lost or destroyed evidence can be the basis to suppress a whole line of related evidence. *See State v. Bauer*, 123 Wis. 2d 444, 368 N.W.2d 59 (Ct. App.), *vacated on other grounds*, 127 Wis. 2d 125, 377 N.W.2d 175 (1985).

The first paragraph of a motion to suppress should cite the classic cases establishing the exclusionary rule, along with cases supporting the specific relief requested (e.g., suppression of statements; suppression of physical evidence; suppression of identification testimony). The second paragraph should cite cases establishing the principle that derivative evidence—the so-called fruit of the poisonous tree—should likewise be excluded. The third paragraph should identify the evidence the defense seeks to have suppressed and should allege facts supporting the claim that the evidence was illegally obtained.

To obtain an evidentiary hearing on a suppression motion, the defense must allege sufficient facts to raise a material issue of fact or to show a reasonable possibility that a hearing will establish facts entitling the defendant to relief. *See, e.g.*, *State v. Samuel*, 2002 WI 34, ¶¶ 35–36, 252 Wis. 2d 26, 643 N.W.2d 423; *State v. Velez*, 224 Wis. 2d 1, 12–14, 589 N.W.2d 9 (1999).

In preparing and litigating suppression motions, the defense attorney should consider that multiple types of evidence may have been obtained as a result of the same infringement on the client's rights. For example, an illegal arrest may have resulted in discovery of drugs on the client's person, and the client may have given an inculpatory statement following the arrest. The attorney could then seek to suppress both the physical evidence and the statement.

For an in-depth discussion of suppression motions and related issues, see Wiseman & Tobin, *supra* § 5.1, chs. 18–21. These chapters focus, respectively, on the exclusionary rule, search and seizure, confessions, and identification procedures. Also available online at the Wisconsin State Public Defender Training Division website are outlines and other materials related to various suppression issues. *See* Wis. State Public Defender's Office, SPD Training, https://training.wispd.org/ (last visited Oct. 31, 2022).

Distribution

Original:	E-file
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Notes

Form 5.44A Motion to Suppress: Basic Form (CRM-0068)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding all evidence obtained in a violation of *(his/her)* constitutional rights, including but not limited to the following: *(specify evidence that should be suppressed.)* The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence was seized in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, VI, and XIV; Wis. Const. art. I, §§ 1, 2, 7, 9, and 11; Wis. Stat. ch. 968; and *Chimel v. California*, 395 U.S. 752 (1969), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"

and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXXII. Motions to Suppress Fruits of Illegal Search or Seizure [§ 5.45]

Commentary and Instructions for Forms 5.45A–5.45D

Form 5.45A	Motion to Suppress Fruits of Vehicle Search (CRM-0069)
Form 5.45B	Motion to Suppress Fruits of Search of Premises (CRM-0070)
Form 5.45C	Motion to Suppress Fruits of Illegal Detention (and Frisk) (CRM-0071)
Form 5.45D	Motion to Suppress Fruits of Illegal Arrest (CRM-0072)

In analyzing motions to suppress the fruits of illegal searches and seizures, such as Forms 5.45A–5.45D, *infra*, the first question is always whether the police had a search warrant. If a warrant was issued, the defense attorney should first refer to Wis. Stat. §§ 968.12–.23. Does the warrant comply with the statutory requirements? *See State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568 (holding that suppression is appropriate when court lacked statutory authority to issue arrest warrant). Was there probable cause for issuing the warrant? Did the officers exceed the warrant's scope? Can the information relied on to obtain the warrant be challenged on grounds that there was an intentional or reckless disregard of the truth? *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985); *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979). If a *Franks*-type challenge is raised, the motion should be accompanied by an affidavit. *See supra* Forms 5.26A–5.26B and accompanying commentary and instructions.

Warrantless searches are per se unreasonable unless the state can establish that the search fell within one of the recognized exceptions. *See* Wis. Stat. §§ 968.10, 968.11, 968.25; *see also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Denk*, 2008 WI 130, ¶ 36, 315 Wis. 2d 5, 758 N.W.2d 775; *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). Generally, in a suppression hearing, the state bears the burden to show that the evidence was obtained in conformity with constitutional standards. *Kieffer*, 217 Wis. 2d at 542; *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). When the challenged search or seizure was not authorized by a warrant, the state has the burden to show that the action was justified under an exception to the warrant requirement. *See, e.g.*, *State v. Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52, 621 N.W.2d 891. The general burden of proof on suppression issues is a preponderance of the evidence. *See, e.g.*, *State v. Raflik*, 2001 WI 129, ¶¶ 53–55, 248 Wis. 2d 593, 636 N.W.2d 690. The Wisconsin Supreme Court has stated, however, that the state's burden, in showing that an exception to the warrant requirement applies, is the higher clear-and-convincing standard. *Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52.

When the defense challenges the validity of a search or arrest warrant, however, the burden is on the defense to show that the information presented to the magistrate who issued the warrant was clearly insufficient to establish probable cause. Probable cause exists when the information known to the police (and, in the case of a warrant, included in the warrant application) is sufficient to show a fair probability that the suspect committed an offense or that evidence will be found in a specific location. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Sloan*, 2007 WI App 146, ¶ 24, 303 Wis. 2d 438, 736 N.W.2d 189. Even if probable cause exists to support a search warrant, the defense may challenge the scope of the authorized search or the manner in which the police conduct the search. *State v. Gralinski*, 2007 WI App 233, ¶ 16, 306 Wis. 2d 101, 743 N.W.2d 448; *State v. LaCount*, 2008 WI 59, ¶ 38, 310 Wis. 2d 85, 750 N.W.2d 780.

> ***Note.*** Rarely is there any dispute about whether the police had a warrant. The defense can generally establish the lack of a warrant by stipulation, judicial notice, or testimony from either the client or an investigating officer.

The defense attorney must determine whether the client has a privacy right that entitles him or her to constitutional protection against unreasonable searches and seizures. Generally, a defendant may seek suppression of physical evidence only if he or she has an actual expectation of privacy that society recognizes as reasonable (the *Katz* test). *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring); *Rakas v. Illinois*, 439 U.S. 128 (1978); *State v. Bruski*, 2007 WI 25, ¶ 22, 299 Wis. 2d 177, 727 N.W.2d 503. The defendant has the burden of showing a legitimate expectation of privacy. *Bruski*, 2007 WI 25, ¶ 22, 299 Wis. 2d 177. Recent U.S. Supreme Court cases have held that, in addition to the *Katz* test, suppression can be based on a physical intrusion onto constitutionally protected effects or real property. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1 (2013) (finding a search when police performed a dog sniff on the defendants' front porch); *United States v. Jones*, 565 U.S. 400 (2012) (finding a search occurred when federal agents attached a GPS device to the defendant's car, despite it only tracking his movements in public). *But see United States v. Lewis*, 38 F.4th 527 (7th Cir. 2022) (holding that dog sniff in exterior hallways outside defendant's hotel room door was not search and did not trigger Fourth Amendment protections).

A motion to suppress physical evidence should identify the evidence the defense seeks to suppress and the date, time, and location (including city and county) of the seizure. In addition, the motion should allege all facts supporting a claim that the evidence was illegally obtained (e.g., evidence that the search was warrantless or was otherwise undertaken without probable cause).

> ***Practice Tip.*** Motions challenging warrantless searches should be worded as broadly as possible, consistent with Wis. Stat. § 971.30(2). It is the state's burden to prove the legality of the search, and it might not be to the defendant's advantage to limit the motion's scope.

Form 5.45C, *infra*, is a motion to suppress fruits of an illegal detention (and frisk, if applicable). The legality of temporary detention is governed by Wis. Stat. § 968.24, which codifies the standard of *Terry v. Ohio*, 392 U.S. 1 (1968), into Wisconsin law:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer *reasonably suspects* that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Wis. Stat. § 968.24 (emphasis added).

The distinction between a seizure and a consensual encounter is often important in suppression cases. A seizure has occurred when a person complies with a show of police authority, under circumstances in which a reasonable person would not have felt that he or she was free to leave or to disregard a police request. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621, 627–28 (1991); *State v. Young*, 2006 WI 98, ¶ 26, 294 Wis. 2d 1, 717 N.W.2d 729; *State v. Williams*, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834. Thus, a police officer may approach a person and ask questions, if under the circumstances a reasonable person would feel free to decline to answer. *United States v. Drayton*, 536 U.S. 194, 203–04 (2002) (holding that police may board a bus and ask passengers for consent to search their luggage); *Williams*, 2002 WI 94, ¶ 22, 255 Wis. 2d 1. For example, in *County of Grant v. Vogt*, 2014 WI 76, ¶ 3, 356 Wis. 2d 343, 850 N.W.2d 253, the Wisconsin Supreme Court addressed the issue of whether a law enforcement officer "seized" a defendant by knocking on his car window and asking him to roll the window down. The court found there was not a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment. An incident that begins as a seizure may evolve into a consensual encounter if the police reasonably convey the message that the person is free to leave. *See Williams*, 2002 WI 94, ¶¶ 26–27, 255 Wis. 2d 1.

When the defense makes a motion to suppress based on an illegal traffic stop, the prosecution has the burden to justify the stop. A stop of a car constitutes a seizure of the car's passengers, as well as the driver. *Brendlin v. California*, 551 U.S. 249, 256–57 (2007); *State v. Harris*, 206 Wis. 2d 243, 253–58, 557 N.W.2d 245 (1996). The state's failure to satisfy the judge by specific, articulable, objective facts that there was a reasonable basis for suspicion should result in the suppression of the evidence. *See, e.g.*, *State v. Fields*, 2000 WI App 218, ¶ 23, 239 Wis. 2d 38, 619 N.W.2d 279 (holding that delay of several seconds at stop sign did not provide reasonable suspicion for stop).

When conducting a search of the person (commonly called a "frisk") during temporary questioning under Wis. Stat. §§ 968.24 and 968.25, the officer must first have a reasonable suspicion of physical danger to himself or herself or to others. *See State v. Johnson*, 2007 WI 32, ¶ 21, 299 Wis. 2d 675, 729 N.W.2d 182. The scope of the search is limited to determining whether the suspect is armed. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *State v. Ford*, 211 Wis. 2d 741, 744–45, 565 N.W.2d 286 (Ct. App. 1997). Although an objective test applies, an officer's subjective belief about danger (or lack of danger) is admissible at a suppression hearing. *State v. Kyles*, 2004 WI 15, ¶¶ 34–39, 269 Wis. 2d 1, 675 N.W.2d 449.

The defense also may challenge a search during an investigatory stop because of the duration of the stop. When police actions after the stop are challenged, the court looks at whether the police action was reasonably related to the circumstances that justified the stop. *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Given that the original stop was justified, the inquiry focuses on the reasonableness of later "incremental intrusion[s]" on the defendant's liberty interest. *State v. Griffith*, 2000 WI 72, ¶ 38, 236 Wis. 2d 48, 613 N.W.2d 72. If the suspect is in a vehicle, the protective search may include the passenger compartment. *Michigan v. Long*, 463 U.S. 1032, 1051–52 (1983). A search may be invalid if the detention continues after the justification for the initial stop has dissipated. *See, e.g.*, *State v. Gammons*, 2001 WI App 36, ¶ 11, 241 Wis. 2d 296, 625 N.W.2d 623; *cf. State v. Griffith*, 2000 WI 72, ¶ 63, 236 Wis. 2d 48, 613 N.W.2d 72 (holding request for passenger's identification permissible).

A crucial issue regarding a traffic stop may be whether the detention had ended before police requested consent to search the vehicle. If a reasonable person would not have felt that he or she could disregard the police request, the defense may argue that the consent was tainted by the excessive length of detention. *See State v. Luebeck*, 2006 WI App 87, ¶¶ 15–16, 292 Wis. 2d 748, 715 N.W.2d 639. However, when the purpose of the stop has not yet been effectuated, officers can request consent to search the defendant, which will result in a legal search if the defendant consents. *See State v. Wright*, No. 2013AP540–CR, 2014 WL 1356791, ¶ 6 (Wis. Ct. App. Apr. 8, 2014) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). Conversely, if the police inform the defendant that he or she is free to leave, a request for consent to search may be permissible. *See State v. Gaulrapp*, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996) (holding request for consent to search permissible, although unrelated to reason for stop). The state has the burden to show that the stop (seizure of person) did not exceed its permissible scope. *Gammons*, 2001 WI App 36, ¶ 11, 241 Wis. 2d 296.

If a search follows an arrest, rather than a *Terry*-type stop, a threshold issue is whether the officer had probable cause to arrest the defendant. *See* Wis. Stat. §§ 968.07, 968.11. An arrest warrant is not generally required, unless the arrest occurs in a private home. *See State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187. Form 5.45D, *infra*, is a motion to suppress evidence obtained as a result of an illegal arrest. Evidence that may be suppressed includes physical evidence and statements obtained as a result of the arrest. *See, e.g.*, *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991); *Nadolinski v.*

State, 46 Wis. 2d 259, 174 N.W.2d 483 (1970). *But see State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775 (stating that when officers have probable cause for arrest but conduct warrantless entry into home to arrest defendant, evidence later obtained from defendant outside the home is not product of illegal governmental activity).

If the arrest was valid, the defense may nonetheless have a basis to challenge a later search. The police are generally entitled to search, incident to a lawful arrest, only the arrestee's person and the area within his or her "immediate control." *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 335 (2009). Before *Gant*, case law recognized much broader authority for searches of a vehicle after the arrest of an occupant. *See, e.g.*, *New York v. Belton*, 453 U.S. 454 (1981); *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. After *Gant*, officers may search vehicles incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *State v. Lefler*, 2013 WI App 22, ¶ 9, 346 Wis. 2d 220, 827 N.W.2d 650; *see also State v. Coffee*, 2020 WI 53, 391 Wis. 2d 831, 943 N.W.2d 845.

The scope of a search incident to arrest, the scope of a frisk for weapons, and the duration of an investigatory stop are examples of a broader issue regarding the incremental intrusion, following an initially lawful police action, on the defendant's expectation of privacy. The defense should consider that even if an initial stop or arrest was justified, later police action may have been unreasonable and thus unconstitutional. *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375–77 (2009) (holding that frisk of student's backpack and outer clothing was justified, but search of her underwear for pills was unreasonable); *Gammons*, 2001 WI App 36, ¶ 24, 241 Wis. 296 (holding that unreasonable duration of stop rendered fruits of search inadmissible).

Illegal stops, detentions, searches, and arrests are generally litigated under U.S. Const. amend. IV as motions to suppress evidence rather than as motions to dismiss. *See* 1 *Wisconsin Judicial Benchbooks—Criminal and Traffic* ch. CR 19 (State Bar of Wis. 7th ed. 2022). Although the state courts generally follow decisions of the U.S. Supreme Court in interpreting parallel constitutional provisions, there may be independent state constitutional grounds supporting a suppression motion. *See* Wis. Const. art. I, §§ 1, 3, 4, 7, 8, 11; *State v. Eason*, 2001 WI 98, ¶ 3, 245 Wis. 2d 206, 629 N.W.2d 625 (interpreting Wis. Const. art. I, § 1 as requiring additional minimal assurances before triggering the good-faith exception to the exclusionary rule). As a caveat, *Eason* is the sole decision in which the Wisconsin Supreme Court departed from its "customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment." *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775.

Violation of a state statute (as opposed to a constitutional provision) may constitute a basis for suppression "depending on the facts and circumstances of the case and the objectives of the statute." *State v. Popenhagen*, 2008 WI 55, ¶ 68, 309 Wis. 2d 601, 749 N.W.2d 611 (abrogating case law limiting suppression for statutory violations). *But see State v. Minett*, 2014 WI App 40, ¶¶ 9–10, 353 Wis. 2d 484, 846 N.W.2d 831 (holding that suppression is not a remedy for violation of Wis. Stat. § 968.255). The defense should plead all applicable state and federal constitutional and statutory grounds.

Many cases involve multiple police actions that are proper subjects for a suppression motion. For example, the defense attorney may wish to challenge a vehicle stop, a search of person, and an interrogation as separate constitutional violations in the same case. Thus, the defense attorney may wish to combine two or more of the following forms to address all relevant issues. The attorney should also be prepared to argue alternative theories for suppression (for example, suppression of drugs found in the client's pocket might be appropriate as the fruit of an illegal vehicle stop or because the later frisk of the client was illegal).

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Notes

Form 5.45A Motion to Suppress Fruits of Vehicle Search (CRM-0069)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS FRUITS OF VEHICLE SEARCH

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding all evidence obtained in a violation of *(his/her)* constitutional rights, including but not limited to the following: *(specify evidence that should be suppressed)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence was seized from a motor vehicle in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, and XIV; Wis. Const. art. I, §§ 1, 2, 9, and 11; Wis. Stat. ch. 968; and *Arizona v. Gant*, 556 U.S. 332 (2009), *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775, *Chimel v. California*, 395 U.S. 752 (1969), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ___________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.45B Motion to Suppress Fruits of Search of Premises (CRM-0070)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS FRUITS OF SEARCH OF PREMISES

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding all evidence obtained in a violation of *(his/her)* constitutional rights, including but not limited to the following: *(specify evidence that should be suppressed)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence was seized from the premises of *(e.g., the defendant's residence or another location in which the defendant has a reasonable expectation of privacy)* in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, and XIV; Wis. Const. art. I, §§ 1, 2, 9, and 11; Wis. Stat. ch. 968; and *Arizona v. Gant*, 556 U.S. 332 (2009), *Chimel v. California*, 395 U.S. 752 (1969), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.45C Motion to Suppress Fruits of Illegal Detention (and Frisk) (CRM-0071)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS FRUITS OF ILLEGAL DETENTION (AND FRISK)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding all evidence obtained in a violation of *(his/her)* constitutional rights, including but not limited to the following: *(specify evidence that should be suppressed)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence was seized from the defendant's person and presence in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, and XIV; Wis. Const. art. I, §§ 1, 2, 9, and 11; Wis. Stat. ch. 968; and *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.45D Motion to Suppress Fruits of Illegal Arrest (CRM-0072)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS FRUITS OF ILLEGAL ARREST

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding evidence obtained as a result of the illegal arrest, including but not limited to the following: *(specify evidence that should be suppressed)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the evidence was obtained in violation of the rights guaranteed by U.S. Const. amends. IV, V, VI, and XIV; Wis. Const. art. I, §§ 7, 8, 9, and 11; Wis. Stat. §§ 968.07, 968.075, and 968.10; and *Brown v. Illinois*, 442 U.S. 590 (1975), and *State v. Smith*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986), *abrogated on other grounds by State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXXIII. Motion to Suppress Identification [§ 5.46]

Commentary and Instructions for Form 5.46A

Form 5.46A Motion to Suppress Identification (CRM-0073)

Form 5.46A, *infra*, is a motion to suppress identification. An *identification* can be a lineup, a photographic identification, a one-on-one showup, or an in-court identification during witness testimony. Identification evidence may be suppressed on due-process grounds or because of violations of the right to counsel under the Sixth Amendment. *See United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *Simos v. State*, 83 Wis. 2d 251, 265 N.W.2d 278 (1978). In *Perry v. New Hampshire*, 565 U.S. 228 (2012), the Supreme Court considered whether the due-process clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police. The Court held it did not: "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 245.

A precharging lineup does not require an attorney's presence. *Kirby v. Illinois*, 406 U.S. 682 (1972); *Jones v. State*, 63 Wis. 2d 97, 216 N.W.2d 224 (1974); *State v. Winters*, 2009 WI App 48, ¶ 32, 317 Wis. 2d 401, 766 N.W.2d 754. However, a postcharging lineup conducted in the absence of counsel may be suppressible. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). Photographic identifications or inadvertent showups do not require counsel. *United States v. Ash*, 413 U.S. 300 (1973); *Jones v. State*, 63 Wis. 2d 97, 216 N.W.2d 224 (1974).

A motion to suppress identification evidence should specify which evidence ought to be suppressed and should indicate the date, time, and location (including city and county) of the identification, if known. To suppress the results of identification procedures of which the defense attorney may be unaware, the motion should contain a catchall phrase, such as the following: "or any other lineup, showup, photographic identification, or other identification procedure to which the defendant may have been subjected." The motion should allege all known facts supporting a claim that the identifications were unduly suggestive.

A specific request should be made for an evidentiary hearing outside the jury's presence. *See* Wis. Stat. § 901.03(3) (stating that court shall minimize jury's exposure to inadmissible evidence). Due process under the U.S. Constitution, however, might not require a hearing in the jury's absence. *Watkins v. Sowders*, 449 U.S. 341 (1981). If the motion to suppress offers no factual basis or area of potential factual inquiry that would support suppression, the court is not required to hold a pretrial evidentiary hearing. *See, e.g.*, *id.* at 348–49; *State v. Velez*, 224 Wis. 2d 1, 12–14, 589 N.W.2d 9 (1999); *State v. Garner*, 207 Wis. 2d 520, 532–35, 558 N.W.2d 916 (Ct. App. 1996).

At the hearing on a motion to suppress identification related to a lineup or photographic array, the defense has the initial burden to show that the identification is unduly or unnecessarily suggestive and that it was conducive to irreparable misidentification. *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983); *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978). If the defense fails to show suggestiveness, the state need not show reliability. If the identification was unnecessarily suggestive, the burden shifts to the state to show by clear and convincing evidence either that the out-of-court identification was reliable or that an independent origin supports the reliability of the in-court identification. *See, e.g.*, *State v. McMorris*, 213 Wis. 2d 156, 167, 570 N.W.2d 384 (1997); *State v. Walker*, 154 Wis. 2d 158, 186, 453 N.W.2d 127 (1990); *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). In deciding reliability, the court should look to the totality of the circumstances surrounding the identification. *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Haynes*, 118 Wis. 2d 21, 30, 345 N.W.2d 892 (Ct. App. 1984). From 2005 to 2019, the Wisconsin Supreme Court adopted a stricter test for the admissibility of identification evidence from a one-on-one showup. *State v. Dubose*, 2005 WI 126, ¶¶ 2, 33, 285 Wis. 2d 143, 699 N.W.2d 582, *abrogated by State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813. *Roberson*, 2019 WI 102, ¶ 81, 389 Wis. 2d 190, abandoned this stricter test, and showup identifications are treated the same as any other identification.

> ***Practice Tip.*** Failure to object to pretrial identification procedures will be considered a strategic waiver by counsel. *State v. Waites*, 158 Wis. 2d 376, 389–90, 462 N.W.2d 206 (1990). The defense attorney should always object and request a hearing. As noted above, the defense bears the initial burden, which shifts to the state upon a showing of the primary illegality. The state then bears the burden to show by clear and convincing evidence that the identification was reliable or was made by an independent source.

Even if the motion to suppress the identification is unsuccessful, the defense has the right to challenge the accuracy of the eyewitness's identification during trial. During such a challenge, many of the same factors raised in the motion to suppress are important in determining the witness's ability to make an accurate identification. *See* Wis. JI—Criminal 141; *Waites*, 158 Wis. 2d 376; *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

Mistaken eyewitness identification is probably the leading cause of wrongful convictions. *See* Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, The Champion, Apr. 2005, at 12; *see also* Innocence Project, *Eyewitness Identification Reform*, https://innocenceproject.org/eyewitness-identification-reform/ (last visited Oct. 31, 2022). Thus, the defense attorney should study the scientific literature and model policies to determine possible deficiencies in police identification procedures and in eyewitness testimony.

When challenging the accuracy of the eyewitness identification during trial, the defense attorney should consider employing an expert witness, usually a psychologist, to testify on the scientific research in the area of witness perception. *See, e.g.*, National Inst. of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003). Such an expert should be able to alert the jury to some of the common misconceptions about eyewitness identifications. *See* Wis. JI—Criminal 141; *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979). The admissibility of this type of expert testimony has been a discretionary determination for the circuit court, *see, e.g.*, *State v. Blair*, 164 Wis. 2d 64, 74–75, 473 N.W.2d 566 (Ct. App. 1991), but the Wisconsin Supreme Court in 2006 noted that the 2005 *Dubose* case and research cited in that case will likely result in broader acceptance of this type of expert testimony. *State v. Shomberg*, 2006 WI 9, ¶¶ 15–17, 43, 288 Wis. 2d 1, 709 N.W.2d 370.

With or without the assistance of an expert witness, the defense attorney should be prepared to cross-examine law-enforcement officers regarding deviations of identification procedures from model policies. *See, e.g.*, Wis. Dep't of Just., Bureau of Training & Standards for Crim. Just., *Model Policy and Procedure for Eyewitness Identification* (2010), https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf; *see also* Wis. Stat. § 175.50 (requiring law enforcement agencies to adopt written policies regarding identification procedures, with goal of reducing risk of mistaken identification). The defense should consider seeking records of training that the officers have attended regarding identification procedures. The information may support an argument either that the department failed to train the officers or that the officers failed to follow the procedures they learned.

Distribution

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Notes

Form 5.46A Motion to Suppress Identification (CRM-0073)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding as evidence the identification of the defendant made at any lineup, showup, photographic identification, or other identification procedure to which the defendant may have been subjected, and any subsequent or anticipated in-court identification of the defendant. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the identification was in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, VI, and XIV; Wis. Const. art. I, §§ 1, 2, 7, 8, 9, and 11; and *Terry v. Ohio*, 392 U.S. 1 (1968), *Mapp v. Ohio*, 367 U.S. 643 (1961), *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983), *State v. Mosley*, 102 Wis. 2d 636, 307 N.W.2d 200 (1981), *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), *Simos v. State*, 83 Wis. 2d 251, 265 N.W.2d 278 (1978), *State v. Isham*, 70 Wis. 2d 718, 235 N.W.2d 506 (1975), *Fells v. State*, 65 Wis. 2d 525, 223 N.W.2d 507 (1974), and *Holmes v. State*, 59 Wis. 2d 488, 208 N.W.2d 815 (1973).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

The defendant specifically requests a hearing before the trial of this action and outside the jury's presence. *Watkins v. Sowders*, 449 U.S. 341 (1981); *State v. Cole*, 50 Wis. 2d 449, 184 N.W.2d 75 (1971).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XXXIV. Motion to Suppress Statements [§ 5.47]

Commentary and Instructions for Form 5.47A

Form 5.47A Motion to Suppress Statements (CRM-0074)

Form 5.47A, *infra*, is a motion to suppress statements, commonly called a *Miranda*-*Goodchild* motion. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). The motion seeks an order from the court excluding from use at trial any statements, confessions, or admissions of the defendant on grounds that they were involuntary (under the due-process clause) or were obtained without first advising the defendant of his or her constitutional rights under *Miranda*. The defense attorney should raise *Miranda* violations and claims of involuntariness as separate grounds; a challenge to one does not incorporate a challenge to the other. *See State v. Jiles*, 2003 WI 66, ¶ 25, 262 Wis. 2d 457, 663 N.W.2d 798.

> ***Note.*** A defendant's pre-arrest silence can now be used in a criminal trial against a defendant who was questioned and declined to provide an answer. This applies to silence to questions before *Miranda* warnings were invoked. *See Salinas v. Texas*, 570 U.S. 178 (2013).

> ***Note.*** There is a presumption in *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), that after a suspect validly invokes the right to counsel, any later waiver is invalid unless an attorney is present or the suspect "initiates further communication, exchanges, or conversations with the police." In *State v. Edler*, 2013 WI 73, ¶ 4, 350 Wis. 2d 1, 833 N.W.2d 564, the Wisconsin Supreme Court adopted the rule in *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010), that the *Edwards* presumption ends when the suspect has been outside police custody for 14 days.

If the defendant was younger than 17 when questioned, a statement obtained during custodial interrogation is ordinarily inadmissible unless the interrogation was electronically recorded. *See State v. Jerrell C.J. (In re Jerrell C.J.)*, 2005 WI 105, ¶¶ 2, 59, 283 Wis. 2d 145, 699 N.W.2d 110 (adopting rule under court's supervisory powers). *But see* Wis. Stat. § 938.31(3)(c) (listing exceptions). Wisconsin has adopted a legislative policy of electronically recording custodial interrogation in felony investigations whenever feasible. Wis. Stat. § 968.073(2). An unexcused failure to record the interrogation of an adult does not, however, directly result in suppression; the statutory remedy is that, if the statement is admitted at trial, the fact-finder may consider the failure to record when evaluating the statement. *See* Wis. Stat. § 972.115(2).

The defendant has a due-process right to a fair hearing to determine suppression issues. *Jiles*, 2003 WI 66, ¶ 27, 262 Wis. 2d 457. The burden is on the prosecution to prove by a preponderance of the evidence that the defendant knowingly and voluntarily waived his or her rights under *Miranda*. *Colorado v. Connelly*, 479 U.S. 157, 168–69 (1986); *State v. Cole*, 2008 WI App 178, ¶ 27, 315 Wis. 2d 75, 762 N.W.2d 711; *State v. Santiago*, 206 Wis. 2d 3, 28, 556 N.W.2d 687 (1996). The prosecution must present live testimony, rather than general police reports. *See Jiles*, 2003 WI 66, ¶ 35, 262 Wis. 2d 457.

The preponderance-of-evidence standard applies also to the state's burden of proof on the voluntariness of a confession. *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 488–89 (1972); *State v. Agnello*, 226 Wis. 2d 164, 179–82, 593 N.W.2d 427 (1999); *Cole*, 2008 WI App 178, ¶ 27, 315 Wis. 2d 75. In evaluating voluntariness, the court considers any coercive police tactics as well as the defendant's personal characteristics. *State v. Hoppe*, 2003 WI 43, ¶¶ 39–40, 261 Wis. 2d 294, 661 N.W.2d 407.

Coercion may consist of psychological tactics that take subtle advantage of the defendant's personal traits. *Id.* ¶ 32.

The defendant may testify at the suppression hearing. If the court finds that the statement was involuntary, the prosecution cannot use it, for any purpose, against the defendant who later testifies at trial. *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Upchurch v. State*, 64 Wis. 2d 553, 219 N.W.2d 363 (1974). If the basis for suppressing the statement is the state's failure to comply with *Miranda*, the statement cannot be used against the defendant at trial except for impeachment. *Harris v. New York*, 401 U.S. 222 (1971); *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971). The defense attorney should insist that the circuit court rule on both the voluntariness and the *Miranda* issues.

The suppression of the fruits of an illegally obtained confession may hinge on whether the confession was involuntary or, although voluntary under the due-process clause, obtained in violation of *Miranda*. Fruits of an involuntary confession are subject to suppression as fruit of the poisonous tree. *State v. Harris*, 199 Wis. 2d 227, 252, 544 N.W.2d 545 (1996). Conversely, courts have declined to suppress fruits of *Miranda* violations (other than the statements obtained in direct violation of *Miranda*). *See, e.g.*, *United States v. Patane*, 542 U.S. 630, 641–44 (2004); *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (holding that second statement is admissible if voluntary).

Despite the distinction between involuntary statements and *Miranda* violations, courts have suppressed fruits of intentional *Miranda* violations. *See Missouri v. Seibert*, 542 U.S. 600, 611–17 (2004) (suppressing post-*Miranda* statement as direct result of earlier violation); *State v. Knapp*, 2005 WI 127, ¶ 73, 285 Wis. 2d 86, 700 N.W.2d 899 (holding, under Wisconsin Constitution, that physical evidence may be suppressed as fruit of intentional *Miranda* violation); *see also Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that *Miranda* procedure is a constitutional rule).

In addition to voluntariness and *Miranda* issues, the defense attorney should consider whether the statement is suppressible as the fruit of an illegal stop or arrest. *See, e.g.*, *Brown v. Illinois*, 422 U.S. 590, 601–05 (1975); *State v. Anderson*, 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991). The statement may be tainted by the illegal detention or arrest, even if the arresting officer read the *Miranda* warnings to the defendant. *Anderson*, 165 Wis. 2d at 448. The courts consider several factors to determine whether the link between the illegality and the later statement is sufficiently attenuated, so as to make the statement admissible. *Id.* at 447–48.

Although the prosecution ordinarily relies on law enforcement officers to obtain statements from suspects, private parties sometimes secretly record conversations that are later given to a law enforcement agency. The Electronic Surveillance Control Law, Wis. Stat. §§ 968.27–.53, governs admissibility of such a recording. *See State v. Duchow*, 2008 WI 57, ¶ 19, 310 Wis. 2d 1, 749 N.W.2d 913 (holding that phrase "oral communication" in Wis. Stat. § 968.27(12) is limited to statements made under circumstances in which speaker had reasonable expectation of privacy).

Motions to suppress statements are probably the most commonly litigated motions in criminal cases. Contrary to popular belief, most defendants who confess do so after they have been given the *Miranda* warnings. The police often encourage the defendant to waive his or her *Miranda* rights, however, and the nature of this encouragement may provide the basis for a suppression motion. The defense attorney should be well versed in the case law on this topic.

Wis. Stat. § 971.31(3) allows courts to determine the admissibility of the defendant's statements at trial, if the issue has not previously been decided. Most courts, however, are more receptive to considering suppression of statements in pretrial proceedings. Also, the defense attorney may adapt trial strategy in light of the court’s ruling on the admissibility of statements.

Distribution

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Notes

Form 5.47A Motion to Suppress Statements (CRM-0074)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding as evidence all statements, oral or written, allegedly made by the defendant to law enforcement officers or any other governmental officials or their agents. The defendant brings this motion pursuant to Wis. Stat. § 971.31(3) and (4) on the grounds that the statements were obtained in violation of the rights guaranteed the defendant under U.S. Const. amends. IV, V, VI, and XIV; Wis. Const. art. I, §§ 1, 2, 7, 8, 9, and 11; and *Harris v. New York*, 401 U.S. 222 (1971), *Terry v. Ohio*, 392 U.S. 1 (1968), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Lynumn v. Illinois*, 372 U.S. 528 (1963), *Mapp v. Ohio*, 367 U.S. 643 (1961), *Brown v. Mississippi*, 297 U.S. 278 (1936), *Upchurch v. State*, 64 Wis. 2d 553, 219 N.W.2d 363 (1974), *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971), and *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

____

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]_________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XXXV. Motion to Dismiss for Destruction of Evidence [§ 5.48]

Commentary and Instructions for Form 5.48A

Form 5.48A	Motion to Dismiss for Destruction of Evidence (CRM-0075)

Form 5.48A, *infra*, is a motion to dismiss for destruction of evidence. *State v. Greenwold (Greenwold II)*, 189 Wis. 2d 59, 67–68, 525 N.W.2d 294 (Ct. App. 1994) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988)); *see also State v. Greenwold (Greenwold I)*, 181 Wis. 2d 881, 885–86, 512 N.W.2d 237 (Ct. App. 1994). This motion seeks an order from the court asking either to dismiss the charges or choose an alternative remedy. It proposes a remedial jury instruction, but the court could fashion another appropriate remedy depending on the nature of the violation. In *State v. Huggett*, 2010 WI App 69, ¶ 27, 324 Wis. 2d 786, 783 N.W.2d 675, the court, after discussing the state's objection to the use of dismissal as the appropriate remedy, stated that the circuit court "recognized dismissal was 'the most Draconian sanction possible,'" and indicated it was hesitant to grant it. Therefore, the court could, depending on the particular facts, choose a remedy short of dismissing the entire action. Form 5.48A, *infra*, offers a sample jury instruction as one option to, at the very least, present to the jury the malfeasance committed by the state directly from the bench. Suppression of evidence is another remedy. *See, e.g.*, *State v. Banks*, No. 2021AP891-CR, 2023 WL 3478558 (Wis. Ct. App. May 16, 2023) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (destruction of recorded interview per 60-day retention policy resulted in suppression of the defendant's *Mirandized* statement).

Defense counsel should consider this motion both when the state fails to preserve a piece of physical evidence (for example, a recording like a cell phone voice message) or fails to perform a particular analysis on a piece of evidence. *See Huggett*, 2010 WI App 69, 324 Wis. 2d 786. Defense counsel should also consider this motion when the state fails to document encounters with potentially exculpatory witnesses. The defense can argue that the officer's decision to not commemorate that interview resulted in the defense having no means to reconstruct the encounter. If the officer took notes and later destroyed them without incorporating them into a report, the defense has a strong argument that evidence was destroyed.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.48A Motion to Dismiss for Destruction of Evidence (CRM-0075)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing all charges. *See State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675; *State v. Greenwold (Greenwold II)*, 189 Wis. 2d 59, 68, 525 N.W.2d 294 (Ct. App. 1994); *State v. Greenwold (Greenwold I)*, 181 Wis. 2d 881, 885–86, 512 N.W.2d 237 (Ct. App. 1994). In the alternative, if the court does not view the facts sufficient to warrant dismissal, the defense requests the following instruction be read to the jury before the start of opening statements:

> Before today's proceedings, the court has received evidence that officers in this case failed to (specify facts supporting the relief requested). Therefore, the jury should consider this behavior as at the least a reckless handling of this investigation and at most a purposeful effort to only collect evidence supportive of their theory. In reviewing the testimony of both the officers and any witness that the officers had contact with, the jury should consider this when assessing their credibility.

(Or state another appropriate remedy based on facts of case)

In support of this matter the defense alleges the following:

1. "A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." *Greenwold II*, 189 Wis. 2d at 67–68 (citing *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988)); *see also Greenwold I*, 181 Wis. 2d at 885–86.

2. Evidence is deemed apparently exculpatory when "the evidence destroyed 'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence ... before the evidence was destroyed,' and (2) the evidence is 'of such a nature that the defendant [is] unable to obtain comparable evidence by other reasonably available means.'" *State v. Munford*, 2010 WI App 168, ¶ 21, 330 Wis. 2d 575, 584–85, 794 N.W.2d 264.

3. "Evidence lacks apparent exculpatory value when ... analysis of that evidence would have offered 'simply an avenue of investigation that might have led in any number of directions.'" *Hubanks v. Franks*, 392 F.3d 926, 931 (7th Cir. 2004) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57 n.* (1988)).

4. Bad faith is shown only if "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." *Greenwold II*, 189 Wis. 2d at 69.

IN FURTHER SUPPORT, the defense asserts:

(Specify the facts that support the relief requested.)

Because this evidence is clearly exculpatory, the court does not need to find bad faith on the part of the officers. *Huggett*, 2010 WI App 69, ¶ 14, 324 Wis. 2d 786. However, even if the court were to find that the above evidence is only potentially exculpatory and thus require a finding a bad faith, there is ample evidence that officers made a conscious decision not to preserve what they knew to be exculpatory evidence. Therefore, the defense moves the court for an order dismissing all counts.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXXVI. Motion to Prohibit Consideration of Prior Conviction [§ 5.49]

Commentary and Instructions for Form 5.49A

Form 5.49A Motion to Prohibit Consideration of Prior Conviction (CRM-0076)

Form 5.49A, *infra*, is a motion to prohibit consideration of a prior conviction. Although there are a variety of purposes for which the prosecution may attempt to use prior convictions, this commentary focuses on situations in which one or more prior convictions affect either the validity of the present charge or the applicable range of potential penalties. These situations include operating-while-intoxicated (OWI) cases, controlled-substance cases, felon-in-possession-of-firearm cases, and sentence-enhancement cases.

> ***Example.*** The defendant is charged with OWI, fourth offense, for convictions in the person's lifetime, which is a felony. *See* Wis. Stat. § 346.65(2)(am)4. If one of the three previous convictions is excluded from consideration, the charge will be reduced to a misdemeanor. *See* Wis. Stat. § 346.65(2)(am)3.
>
> In addition to resulting in the charge reduction, the exclusion of the prior conviction may substantially change the definition of prohibited alcohol concentration, which is a critical issue if the prosecution has evidence of a chemical test. *See* Wis. Stat. § 340.01(46m) (defining *prohibited alcohol concentration* as 0.08 if defendant has two or fewer prior violations and as 0.02 if defendant has three or more prior violations; lower threshold also applies if defendant, at time of present violation, was subject to ignition-interlock-device order).

Form 5.49A, *infra*, specifically alleges a violation of the defendant's constitutional right to counsel in the case that resulted in the prior conviction. A court cannot rely on a prior conviction to enhance a sentence if the conviction was obtained in violation of this fundamental right. *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *State v. Hahn*, 2000 WI 118, ¶ 25, 238 Wis. 2d 889, 618 N.W.2d 528.

A defendant may collaterally attack the validity of a prior conviction only by alleging a violation of the right to counsel. *State v. Peters*, 2001 WI 74, ¶¶ 14–15, 244 Wis. 2d 470, 628 N.W.2d 797; *Hahn*, 2000 WI 118, ¶ 28, 238 Wis. 2d 889.

> ***Note.*** Neither Form 5.49A, *infra*, nor this commentary encompasses the court's discretionary decision whether a prior conviction is admissible to impeach the defendant's (or another witness's) credibility. *See* Wis. Stat. § 906.09.

Other challenges to the prior conviction must be raised in postconviction proceedings directly related to the prior case. *See Hahn*, 2000 WI 118, ¶ 28, 238 Wis. 2d 889. If the attorney is pursuing such postconviction relief, he or she may wish to seek a stay of the present case until the postconviction proceeding is completed.

Because the right to counsel under the Wisconsin Constitution has a broader scope than the parallel federal right, a collateral attack should specifically include the state constitutional right as authority for the motion. *Compare State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 550, 249 N.W.2d 791 (1977) (noting that Wisconsin Constitution's right to counsel applies to all criminal cases in which incarceration is a potential penalty), *with Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that federal right to counsel does not apply in misdemeanor case unless court imposes imprisonment).

The leading case on challenges to uncounseled convictions is *State v. Ernst*, 2005 WI 107, ¶ 14, 283 Wis. 2d 300, 699 N.W.2d 92, which states that, before accepting a waiver of the right to counsel, the circuit court must conduct a colloquy with the defendant to ensure that the defendant (1) voluntarily decided to proceed without counsel, (2) knew of the "difficulties and disadvantages" of proceeding without counsel, (3) knew the seriousness of the charges, and (4) knew the general range of potential penalties. *See also infra* § 8.24.

A deficient colloquy, however, is not sufficient to warrant a meritorious motion challenging a prior conviction. To meet the initial burden and state a prima facie case of a constitutional violation, the defendant must allege specific, crucial information that he or she did not know of or did not understand. *Ernst*, 2005 WI 107, ¶ 25, 283 Wis. 2d 300. If the defendant establishes this prima facie case, the burden shifts to the prosecutor to show that a valid waiver of counsel occurred in the earlier proceeding. *Id.* ¶ 27. The prosecutor may call the defendant as an adverse witness at the motion hearing, and the privilege against self-incrimination does not apply to questions about the waiver issue in the prior case. *Id.* ¶¶ 2, 37.

Before bringing this motion, the attorney should review available court records from the prior conviction and should closely question the client regarding his or her understanding at the time of the prior case. *See infra* § 8.24, Practice Tip. Depending on how long ago the conviction occurred and on other circumstances, the defendant may run the risk that the prosecutor will seek to vacate any plea agreement that existed in the prior case and may reinstate charges that were previously dismissed. *See State v. Deilke*, 2004 WI 104, ¶¶ 2, 26, 274 Wis. 2d 595, 682 N.W.2d 945.

Distribution

Original:	E-file
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Notes

Form 5.49A Motion to Prohibit Consideration of Prior Conviction (CRM-0076)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO PROHIBIT CONSIDERATION OF PRIOR CONVICTION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge this court's jurisdiction, moves the court for an order prohibiting consideration of the defendant's prior conviction alleged to have occurred on *(date)*. The defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the prior conviction was obtained in violation of the defendant's right to counsel under U.S. Const. amends. VI and XIV; Wis. Const. art. I, § 7; and *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W.2d 791 (1977), and *Burgett v. Texas*, 389 U.S. 107 (1967).

IN FURTHER SUPPORT, the defense asserts:

(Specify the facts that support the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXXVII. Bail Motions [§ 5.50]

Commentary and Instructions for Forms 5.50A–5.50C

Form 5.50A	Motion for Grant or Reduction of Bail (CRM-0077)
Form 5.50B	Motion for Release from Obligations of Bond (CRM-0078)
Form 5.50C	Sample Affidavit of Equity (CRM-0079)

Motions relating to the grant or reduction of bail are often filed in criminal cases. Wis. Const. art. I, §§ 6, 8 and Wis. Stat. ch. 969 are the primary references for the law governing bail in Wisconsin. Wis. Stat. § 969.001(1) defines *bail* as "monetary conditions of release." Many attorneys, however, use the term "bail" to refer generically to all conditions of release. The Wisconsin Constitution creates a presumption in favor of release, stating

> All persons, before conviction, shall be eligible for release under reasonable conditions.… Monetary conditions of release may be imposed … only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court, or if the person is accused of a violent crime as defined by the legislature by law, only upon a finding that there is a reasonable basis to believe that the conditions are necessary based on the totality of the circumstances, taking into consideration whether the accused has a previous conviction for a violent crime … the probability that the accused will fail to appear in court, the need to protect members of the community from serious harm …, the need to prevent the intimidation of witnesses, and the potential affirmative defenses of the accused.

Wis. Const. art. I, § 8; *see also* Wis. Stat. § 969.01(1). Bail should not substitute for pretrial detention under Wis. Stat. § 969.035.

Although the purpose of cash bail is to ensure the defendant's appearance, the cash is not necessarily returned to the defendant (or other person who posted it) at the end of the case. If the defendant is convicted, the cash must be applied to pay any court-ordered restitution and, if any cash remains after payment of restitution, to pay other monetary components of the judgment (fine, costs, fees, and surcharges). *See* Wis. Stat. §§ 969.02(6), 969.03(4). The person posting court-ordered cash bail must be given written notice that the bail money will be applied in this manner if the court orders any such payments. Wis. Stat. §§ 969.02(2), 969.03(1)(d).

From the defense perspective, much preferable to cash bail is an "unsecured appearance bond," Wis. Stat. §§ 969.02(1), 969.03(1), commonly referred to as a *signature bond* or *recognizance bond*. This type of bond may include an assigned dollar amount, but the client is not required to post bail (cash) before being released on bond. The dollar amount of the signature bond becomes significant only if the client misses a court appearance or is otherwise accused of violating the conditions of the bond.

Common nonmonetary conditions of bond include no-contact (with the alleged victim) provisions and no-drink provisions. All bonds include the conditions that the defendant must not commit any crime, Wis. Stat. §§ 969.02(4), 969.03(2), and that the defendant "shall give written notice to the clerk of any change" of address within 48 hours, Wis. Stat. § 969.10.

Form 5.50A, *infra*, is a motion seeking the grant or reduction of bail. The motion should assert as grounds all facts supporting the relief requested (e.g., "the defendant has been in custody since *(date)*, and is unable to meet the monetary conditions of release," or "the amount of bail set in this case is excessive, contrary to the United States Constitution, the Wisconsin Constitution, and the laws of Wisconsin, and results in the defendant being unnecessarily detained"). In arguing the motion, the attorney should be prepared to suggest nonmonetary conditions of release that might persuade the court to reduce bail or allow release without bail.

Form 5.50B, *infra*, is a motion for release from the defendant's bond. If the court cannot grant the defendant a speedy trial in accordance with Wis. Stat. § 971.10, the court should release the defendant from custody or discharge the defendant from the obligations of bond. Wis. Stat. § 971.10(4). A statutory speedy-trial violation in a misdemeanor case entitles the defendant to release from custody but does not exempt the defendant from conditions of the bond. *Id.*

Form 5.50C, *infra*, is a sample affidavit of equity in property. Wis. Stat. §§ 969.02(2) and 969.03(1)(d) allow the court to require the execution of an appearance bond with sufficient solvent sureties to guarantee the defendant's appearance for trial. Some courts may allow a friend or relative of the client to cosign an unsecured bond in lieu of depositing assets with the court. Before allowing this procedure, the court usually requires information regarding the prospective cosigner's status (e.g., ties to the community, employment, ownership of and equity in real estate). The court may also explain to the prospective cosigner that, if the client violates a condition of bond, the cosigner will be liable for the dollar amount stated on the bond. Either personal property or real estate may be posted to secure the bond. In the case of personal property, the clerk of court will usually require that the property be delivered to the clerk or the county sheriff for safekeeping. If the personal property is a motor vehicle, the title usually must be delivered to the clerk. In many cases, the court may require an appraisal or other method of establishing the property's value.

The requirements for real property are more complicated, and therefore the defense attorney and client ordinarily will work with a representative of a bank or other lending institution. Many courts require that the real property be located in Wisconsin, although the statute does not require this. *See* Wis. Stat. § 969.12. The specific requirements for a property bond may vary from county to county, and the attorney should inquire with the clerk of court to determine the local procedures. Some or all of the following documents may be required:

1. A mortgage naming the clerk of court for the county as mortgagee;

2. A mortgage note to the clerk of court for the county in the amount of the bond;

3. A letter report of title from a title company;

4. An appraisal or other proof of value (e.g., a recent sale); and

5. An affidavit of equity or a statement from the mortgage company indicating that the person posting the property has an equity interest in the property at least equal to the amount of the bond, *see infra* Form 5.50C.

If a mortgage is required, it should be completed in the standard manner as for a real estate transaction, with a full legal description of the property, the property's street address, and some reference to the number of the criminal case for which the property is posted as security. The mortgage should be returnable to the clerk of court for the county after it has been filed with the register of deeds.

The clerk of court or county corporation counsel will probably want to review all the documents before they are filed with the register of deeds for the county in which the property is located. Once the mortgage and note are filed with the register of deeds, the receipt should be presented to the clerk of court, so the appropriate bond form can be executed and the defendant released.

The defense attorney should advise the client of the potential consequences of violating conditions of release. These consequences include issuance of an arrest warrant, forfeiture of bail, imposition of cash bail (or higher cash bail), and issuance of criminal charges of bail jumping.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.50A Motion for Grant or Reduction of Bail (CRM-0077)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR *(GRANT/REDUCTION)* OF BAIL

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court to *(grant/reduce)* the defendant's bail. The defendant brings this motion pursuant to U.S. Const. amends. VIII and XIV; Wis. Const. art. I, §§ 6 and 8; and Wis. Stat. ch. 969.

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.50B Motion for Release from Obligations of Bond (CRM-0078)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR RELEASE FROM OBLIGATIONS OF BOND

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for the defendant's release from the obligations of the bond and for the *(return of any cash bail/cancellation of any surety)*. The defendant brings this motion pursuant to U.S. Const. amends. VIII and XIV; Wis. Const. art. I, §§ 6 and 8; and Wis. Stat. ch. 969 *(and Wis. Stat. § 971.10)*.

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.50C Sample Affidavit of Equity (CRM-0079)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________, Case No. *(1.02)*

Defendant

AFFIDAVIT OF EQUITY

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(Affiant's name), being sworn, says:

1. I am the owner of a house and land located at *(address)*.
2. I have owned the property for approximately *(specify number)* years.
3. The property's market value is at least *(specify amount)* and the assessed value is *(specify amount)*.
4. The mortgage balance owed to *(identify mortgage company)* is approximately *(specify amount)*.
5. The liens against the property are no more than *(specify amount)*.
6. The total equity in the property is at least *(specify amount)*.

_______________ */s/* _______________
(Affiant's Name)

Signed and sworn to before me
on _______________ *(date)* _______________

by ____

______________________ *`/s/`* ______________________
Notary Public, State of Wisconsin
My commission ____________________________
☐ This notarial act involved the use of communication technology.

XXXVIII. Motion for Continuance [§ 5.51]

Commentary and Instructions for Form 5.51A

Form 5.51A Motion for Continuance (CRM-0080)

Form 5.51A, *infra*, is a motion for continuance, to which the defense attorney should add case-specific grounds for the continuance.

Wis. Stat. § 971.10(3), governing continuances in criminal cases, is a subsection of the general statute on speedy trials in criminal cases. Motions for continuances generally are discretionary with the circuit court. A continuance may be granted "if the ends of justice served by [the continuance] outweigh the best interest of the public and the defendant in a speedy trial." Wis. Stat. § 971.10(3)(a). The court must set forth in the record the reasons why the continuance is justified. Wis. Stat. § 971.10(3)(c) specifically states that a continuance is not justified because of general congestion of the court's calendar, lack of diligent preparation, or failure to obtain available witnesses on the state's part.

Statutory considerations for deciding a motion for continuance are the following:

1. Whether failure to grant the continuance would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice;

2. Whether the case is so unusual and complex that additional time is necessary to prepare the case; and

3. The interests of the victim, as defined in Wis. Stat. § 950.02(4).

Wis. Stat. § 971.10(3)(b). Additional factors the court should consider include

1. The length of the delay requested,

2. Whether the defendant has requested and received other continuances,

3. Whether the state has requested and received other continuances,

4. The inconvenience to other persons involved (e.g., witnesses and experts), and

5. Whether the delay is for legitimate purposes.

See State v. Robinson, 145 Wis. 2d 273, 280, 426 N.W.2d 606 (Ct. App. 1988).

The most persuasive reasons for a continuance relate to the defendant's rights to effective counsel and a fair trial. *See State v. Fink*, 195 Wis. 2d 330, 338, 536 N.W.2d 401 (Ct. App. 1995). If further investigation is needed, and if the defense has not been negligent in pursuing the investigation, the court should grant a motion for continuance. Similarly, the court should grant the motion if the attorney of record cannot participate in the trial for a legitimate reason and no other associate can competently step in for the attorney. *Cf. Phifer v. State*, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974) (setting forth factors when request for change of counsel entails a request for continuance).

The appellate court will not reverse a decision to deny a motion for continuance in the absence of an erroneous exercise of discretion. *State v. Berg*, 116 Wis. 2d 360, 369–70, 342 N.W.2d 258 (Ct. App. 1983). If the motion is denied, the defense attorney should make an adequate record to establish erroneous exercise of discretion. *See Fink*, 195 Wis. 2d at 339–40.

Distribution

Original: E-file
Copy: Client; client file

Notes

Form 5.51A Motion for Continuance (CRM-0080)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR CONTINUANCE

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for a continuance of the *(jury trial/hearing)* in this case presently scheduled for *(state date and time)*. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 5, 6, 7, and 8; and Wis. Stat. § 971.10(3).

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XXXIX. Demand for Speedy Trial [§ 5.52]

Commentary and Instructions for Form 5.52A

Form 5.52A Demand for Speedy Trial (CRM-0081)

The right to a speedy trial has both a constitutional and a statutory dimension. Denial of the constitutional right to a speedy trial will result in a dismissal. In analyzing whether the violation is of constitutional proportions, the court should consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant made a demand for a speedy trial, and (4) the prejudice to the defendant. *Vermont v. Brillon*, 556 U.S. 81, 89–90 (2009); *Barker v. Wingo*, 407 U.S. 514 (1972); *Hatcher v. State*, 83 Wis. 2d 559, 266 N.W.2d 320 (1978); *State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324. The defense may need to show prejudice to the defendant, depending on the length of the delay. *Barker*, 407 U.S. 514; *State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982); *Scarbrough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977); *Hadley v. State*, 66 Wis. 2d 350, 225 N.W.2d 461 (1975). Note that delay caused by systematic problems in the public defender system can be attributed to the state. *Vermont*, 556 U.S. at 94. *But see United States v. Weidenburner*, 550 F. App'x 298, 302 (7th Cir. 2013) (requiring allegation that delay was caused by attorney inaction or systematic failures to appoint, denying attribution of delay to the state when record shows that attorney was adequately working on case).

Denial of the statutory right to a speedy trial will result in the defendant's discharge from custody or release from the obligations of his or her bond. *See* Wis. Stat. § 971.10(4). In a misdemeanor case, the only remedy for a statutory speedy-trial violation is release from custody. *Id.* The defendant is entitled to trial within 60 days after the initial appearance in a misdemeanor and within 90 days after the date trial is demanded in a felony. Wis. Stat. § 971.10(1), (2)(a). The defense must make a demand for trial on the record or in writing. Wis. Stat. § 971.10(2)(a).

Form 5.52A, *infra*, is a standard demand for speedy trial, citing both constitutional and statutory provisions.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.52A Demand for Speedy Trial (CRM-0081)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) _______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S DEMAND FOR SPEEDY TRIAL

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, demands a speedy trial. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 6, 7, and 8; and Wis. Stat. § 971.10.

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XL. Motion for Change of Venue or Venire [§ 5.53]

Commentary and Instructions for Forms 5.53A–5.53B

Form 5.53A	Motion for Change of Venue or Venire (CRM-0082)
Form 5.53B	Sample Affidavit in Support of Motion for Change of Venue or Venire (CRM-0083)

Wis. Stat. §§ 971.22 and 971.225 govern motions to change the place of trial and motions to select the jury in another county. These motions are often called motions for change of venue and motions for change of venire. Only the defendant has a right to a change of venue or venire. *State v. Mendoza*, 80 Wis. 2d 122, 136, 137, 258 N.W.2d 260 (1977). It has become increasingly common to select the jury in another county and to return it to the original county for the trial. Juries selected in this manner are sequestered. *See* Wis. Stat. § 971.225(1)(a); *see also* Wis. Stat. § 972.12.

If the defense seeks a change of venue, the attorney must make a motion to change the place of trial at the arraignment. Wis. Stat. § 971.22(1). The defense can do so at a later date only on a showing of cause. *Id.*

The right to a fair trial is protected by the federal and state constitutions, in addition to the Wisconsin statutes. *See, e.g.*, *United States v. Ruiz*, 536 U.S. 622 (2002); *Hammill v. State*, 89 Wis. 2d 404, 407, 278 N.W.2d 821 (1979). In seeking a change under Wis. Stat. § 971.22 or 971.225, the defense attorney should stress the constitutional magnitude of the issue in the particular case. *See Groppi v. Wisconsin*, 400 U.S. 505 (1971).

To succeed on a motion of this nature, the defendant need not show actual prejudice. Rather, the defense must show a reasonable probability of prejudice. *Hoppe v. State*, 74 Wis. 2d 107, 111, 246 N.W.2d 122 (1976). In deciding whether to pursue a motion for change of venue or venire, the attorney should be familiar with the factors favoring a change. *See, e.g.*, *State v. Fonte*, 2005 WI 77, ¶ 31, 281 Wis. 2d 654, 698 N.W.2d 594, *modified on other grounds*, 2005 WI 145, 286 Wis. 2d 77, 704 N.W.2d 912; *Hoppe*, 74 Wis. 2d at 110; *Hussong v. State*, 62 Wis. 2d 577, 591–92, 215 N.W.2d 390 (1974), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990); *Tucker v. State*, 56 Wis. 2d 728, 733–34, 202 N.W.2d 897 (1973); *State v. Albrecht*, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

Form 5.53B, *infra*, is a sample affidavit in support of a motion for change of venue or venire predicated on prejudicial pretrial publicity. There are other grounds for prejudice that could prevent a fair and impartial trial, such as race and the nature of the offense. The attorney should alter the motion (*infra* Form 5.53A) and affidavit to fit the circumstances of the particular case.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.53A Motion for Change of Venue or Venire (CRM-0082)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR CHANGE OF (VENUE/VENIRE)

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for a change in the *(place of trial/venire by empaneling a jury from another jurisdiction)*, or for such other and further relief as the case may require, because an impartial trial cannot be had in *(1.01)* County, as more fully appears from the attached affidavit. The defendant brings this motion pursuant U.S. Const. amends. V, VI, and XIV; Wis. Const. art. I, §§ 6, 7, and 8; and Wis. Stat. § *(971.22/971.225)*.

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 5.53B Sample Affidavit in Support of Motion for Change of Venue or Venire (CRM-0083)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ________________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR CHANGE OF (VENUE/VENIRE)

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(2.01) (Attorney Handling Case) being sworn, states as follows:

1. I am the attorney for the defendant in this case.
2. I have investigated the pretrial publicity regarding this case, the alleged offense, the investigation of the alleged offense, the defendant's arrest, and the proceedings in this case.
3. I have collected *(newspaper and magazine articles/and/editorial comment)* regarding this case from newspapers circulated in this county; they are attached to this affidavit as exhibits numbered 1 through *(indicate last number)* and are incorporated by reference.
4. *(1.01)* County is served by the following newspapers and magazines, having reported circulations as indicated:

(List names and circulation of newspapers and magazines.)

5. I have collected *(audio recordings/and/transcripts)* of *(pretrial publicity/and/editorial comment)* regarding this case from broadcasts in this county; they are attached to this affidavit as exhibits numbered *(indicate first number)* through *(indicate last number)* and are incorporated by reference.

6. *(1.01)* County is served by the following radio stations, having reported listening audiences as indicated:

(List names and listenership of radio stations.)

7. I have collected *(video recordings/and/transcripts)* of *(pretrial publicity/and/editorial comment)* regarding this case from broadcasts in this county; they are attached to this affidavit as exhibits numbered *(indicate first number)* through *(indicate last number)* and are incorporated by reference.

8. *(1.01)* County is served by the following television stations, having reported viewing audiences as indicated:

(List names and viewing audience of television stations.)

9. The *(pretrial publicity in this case/and/editorial comment)—(its/their)* quantity, frequency, prominence, content, and details—*(has/have)* so prejudiced the defendant's right to secure a fair and impartial trial as to require a change in the *(place of trial/venire by empaneling a jury from another jurisdiction)*.

_______________ */s/* _______________
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Signed and sworn to before me
on _______________ *(date)* _______________
by ______________________________

_______________ */s/* _______________
Notary Public, State of Wisconsin
My commission ______________________
☐ This notarial act involved the use of communication technology.

XLI. Motions for Severance [§ 5.54]

Commentary and Instructions for Forms 5.54A–5.54D

Form 5.54A	Motion to Sever Defendants (CRM-0084)
Form 5.54B	Sample Affidavit in Support of Motion to Sever Defendants (CRM-0085)
Form 5.54C	Motion to Sever Charges (CRM-0086)
Form 5.54D	Sample Affidavit in Support of Motion to Sever Charges (CRM-0087)

Wis. Stat. § 971.12 governs the joinder and severance of defendants and crimes. Many of the same principles apply to joinder and severance. The court may balance the defendant's rights against considerations of efficient judicial administration, but the overriding consideration is the defendant's right to a fair trial. *Jung v. State*, 32 Wis. 2d 541, 546, 145 N.W.2d 684 (1966). The circuit court's decision is an exercise of its discretion; absent a showing of erroneous exercise of that discretion, the appellate court will uphold the trial judge's decision. *State v. Hall*, 103 Wis. 2d 125, 140, 307 N.W.2d 289 (1981); *State v. Bellows*, 218 Wis. 2d 614, 623, 582 N.W.2d 53 (Ct. App. 1998).

Defendants may be joined in the same complaint, information, or indictment. Wis. Stat. § 971.12(2). Such joinder can present problems in motions challenging the sufficiency of the complaint, information, or indictment. The defense attorney should be alert to these potential problems and make the appropriate motions to strike portions of the complaint, information, or indictment.

Generally, the most significant problems arise when the prosecution seeks a joint trial of multiple defendants. If the defendants are not joined in the same charging document, the district attorney may move for joinder. Local court rules may provide for joinder without a motion. In light of the statute, the defense attorney should protest such automatic joinder whenever it disadvantages his or her client. The district attorney should be required to make the appropriate motion in a timely manner under Wis. Stat. § 971.31 and required to satisfy the court that joinder is appropriate.

At a hearing on a motion to sever, the defendant seeking severance has the burden to show that a joint trial will result in prejudice to the defense. *Bellows*, 218 Wis. 2d at 624. To show that the circuit court erroneously exercised its discretion in denying a severance, the defendant must demonstrate "substantial prejudice." *See, e.g.*, *State v. Griffith*, 220 Wis. 2d 371, 388–89, 584 N.W.2d 127 (Ct. App. 1998) (discussing joinder of offenses); *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) (discussing joinder of defendants).

A court should grant severance of defendants under the following circumstances:

1. If the defendants are not alleged to have participated in the same act or transaction or in the same series of acts or transactions, *see* Wis. Stat. § 971.12(2);

2. If a line of evidence (a substantial body of evidence) is produced that is admissible as to one defendant but is unduly prejudicial to another, *see State v. Jennaro*, 76 Wis. 2d 499, 505, 251 N.W.2d 800 (1977); *State v. DiMaggio*, 49 Wis. 2d 565, 182 N.W.2d 466 (1971); *State v. Patricia A.M.*, 168 Wis. 2d 724, 732–33, 484 N.W.2d 380 (Ct. App. 1992), *rev'd on other grounds*, 176 Wis. 2d 542, 500 N.W.2d 289 (1993);

   Note. The circuit court has the discretion, however, to use a cautionary instruction instead of granting a severance. *DiMaggio*, 49 Wis. 2d at 577; *Patricia A.M.*, 168 Wis. 2d at 732.

3. If the defendants have "antagonistic defenses," *see, e.g.*, *Jung*, 32 Wis. 2d at 546; *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984); *but see Haldane v. State*, 85 Wis. 2d 182, 190, 270 N.W.2d 75 (1978) (noting that Wisconsin Supreme Court "has been slow to find grounds for reversal" on basis of rejecting this reason for severance), *abrogated on other grounds by State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609; or

4. If there is a need for a co-defendant's testimony, *see State v. Brown*, 114 Wis. 2d 554, 559, 338 N.W.2d 857 (Ct. App. 1983), *abrogated on other grounds by State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609.

In addition, if one defendant's confession implicates another defendant and is to be used at a joint trial, severance may be required. *See Bruton v. United States*, 391 U.S. 123 (1968). Cautionary instructions to the jury are not sufficient to cure the prejudice. *Id.* If it is possible, however, to delete those portions of the statement that refer to the other defendant, severance might not be required. *Pohl v. State*, 96 Wis. 2d 290, 301, 291 N.W.2d 554 (1980). Alternatively, the court may hold two simultaneous trials, with separate juries for each defendant. *State v. Avery*, 215 Wis. 2d 45, 52–53, 571 N.W.2d 907 (Ct. App. 1997).

Wis. Stat. § 971.12(1) allows for the joinder of crimes or charges under any of the following three circumstances:

1. If the crimes charged are of the same or similar character,

2. If the crimes charged are based on the same act or transaction, or

3. If the crimes charged are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Even under these circumstances, however, charges may be severed in situations such as the following:

1. If there is a danger that the cumulative effect of the joined charges may suffice to convince the jury of the defendant's guilt, whereas one charge would not, *see Bailey v. State*, 65 Wis. 2d 331, 222 N.W.2d 871 (1974);

2. If the crimes, although of the same or a similar character, did not occur over a relatively short time and if the evidence as to each does not overlap, *see State v. Davis*, 2006 WI App 23, ¶¶ 12–14, 289 Wis. 2d 398, 710 N.W.2d 514; *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988); or

3. If the defendant wishes to testify on one charge, but not on another.

   Note. In such instances, the defendant must show substantial prejudice; if the evidence of other crimes would be admissible in separate trials to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a specific element of the crime charged, then there is no substantial prejudice. *See* Wis. Stat. § 904.04(2); *State v. Hall*, 103 Wis. 2d 125, 307 N.W.2d 289 (1981). Wis. Stat. § 904.04(2)(b) allows evidence of similar acts by the accused, regardless of the victim, to be admissible in certain human trafficking, crimes against children, serious sex offenses, and domestic abuse crimes. Wis. Stat. § 904.04(2)(b) also allows certain sexual assault convictions to be used as character evidence to show that the defendant acted in conformity with that character.

The court should not allow joinder of charges unless the facts fit one of the three conditions set forth in Wis. Stat. § 971.12(1).

Form 5.54A, *infra*, is a motion to sever defendants, and Form 5.54C, *infra*, is a motion to sever charges. Forms 5.54B and 5.54D, *infra*, are sample affidavits in support of these motions. The sample affidavits are included for illustrative purposes and must be modified to fit the facts of the particular case.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.54A Motion to Sever Defendants (CRM-0084)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO SEVER DEFENDANTS

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order granting a severance and separate trial for the defendants. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 6, 7, and 8; and Wis. Stat. §§ 971.31(2) and (5) and 971.12.

AS GROUNDS, the defendant asserts that the joinder of the defendant with other defendants will be substantially prejudicial because:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney’s Email Address)

Form 5.54B Sample Affidavit in Support of Motion to Sever Defendants (CRM-0085)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO SEVER DEFENDANTS

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(2.01) (Attorney Handling Case), being sworn, states as follows:

1. I am the attorney for the defendant in this case.

2. I make this affidavit in support of the defendant's motion for severance of defendants.

3. In preparing this case for trial, I have made demands *(and motions)* for discovery, disclosure, and inspection, and I have conducted an independent investigation of the case.

   (Include specific reasons in support of motion, such as fact situations described in the following paragraphs. Number each paragraph and use subheadings, if helpful, to highlight multiple reasons for severance.)

4. In connection with the discovery process and my independent investigation, I have learned that *(name(s) of co-defendant(s)) (has/have)* given *(a)* statement*(s)* that implicate*(s)* and *(is/are)* substantially prejudicial to *(3.01) (Client's Name)*.

5. I have conferred with counsel for *(name(s) of co-defendant(s))* and have been advised that *(name(s) of co-defendant(s) who gave statements implicating the defendant)* *(has/have)* given *(a)* statement*(s)* that *(is/are)* substantially prejudicial to *(3.01) (Client's Name)*.

6. I am informed and believe that the statement*(s)* of *(name(s) of co-defendant(s) who gave statements implicating the defendant)* implicating *(3.01) (Client's Name)* would be inadmissible at a trial of *(3.01) (Client's Name)* if *(he/she)* were tried separately, but that, if the statement*(s)* were admitted in evidence in a joint trial, *(it/they)* would substantially prejudice the defense of *(3.01) (Client's Name)*.

7. I am informed and believe that *(name(s) of co-defendant(s)) (has/have) (a)* long criminal record*(s)*, and if *(he/she/they)* should take the stand and testify, *(3.01) (Client's Name)* would be substantially prejudiced.

8. I am informed and believe that *(name(s) of co-defendant(s)) (is/are)* currently under sentence to a penal institution in this state and that, if *(he/she/they)* should take the stand and testify, *(3.01) (Client's Name)* would be prejudiced.

9. It is my intent to call the co-defendant*(s)* as *(a)* witness(es) on behalf of *(3.01) (Client's Name)*.

10. I am informed and believe that the defenses of *(3.01) (Client's Name)* and *(name(s) of co-defendant(s))* are antagonistic in the following particulars:

(Detail how the defense of one defendant
is antagonistic to that of the other(s).)

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Signed and sworn to before me
on ______ *(date)* ______
by ______________________

/s/
Notary Public, State of Wisconsin
My commission ______________
☐ This notarial act involved the use of communication technology.

Form 5.54C Motion to Sever Charges (CRM-0086)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION TO SEVER CHARGES

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order granting a severance and separate trial of the charges now pending against the defendant. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, VIII, and XIV; Wis. Const. art. I, §§ 6, 7, and 8; Wis. Stat. §§ 971.31(2) and (5) and 971.12; and *State v. Davis*, 2006 WI App 23, 289 Wis. 2d 398, 710 N.W.2d 514.

AS GROUNDS, the defendant asserts that the joinder of the charges for trial will substantially prejudice the defendant because:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)

(2.07) (Attorney's Email Address)

Form 5.54D Sample Affidavit in Support of Motion to Sever Charges (CRM-0087)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO SEVER CHARGES

STATE OF WISCONSIN)
)
(1.01) COUNTY)

(2.01) (Attorney Handling Case), being sworn, states as follows:

1. I am the attorney for the defendant in this case.

2. I make this affidavit in support of the defendant's motion to sever charges.

3. The defendant intends to testify in *(his/her)* own defense on count number *(indicate charge)*. The testimony *(he/she)* intends to give on that count would be inadmissible in any trial on the other counts.

   (Include specific reasons in support of motion, such as fact situations described in the following paragraphs. Number each paragraph and use subheadings, if helpful, to highlight multiple reasons for severance.)

4. The jury will regard the evidence on count *(indicate charge)* as sufficient in itself to find the defendant guilty of the other count*(s)*.

5. The crimes charged are not of the same or similar character.

6. The crimes charged are not based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Signed and sworn to before me
on *(date)*
by

/s/
Notary Public, State of Wisconsin
My commission
☐ This notarial act involved the use of communication technology.

XLII. Motion in Limine [§ 5.55]

Commentary and Instructions for Form 5.55A

Form 5.55A Motion in Limine (CRM-0088)

A motion in limine is an evidentiary motion with two main purposes: (1) to obtain a ruling that excludes potentially harmful evidence, and (2) to prohibit the prosecutor and the prosecution's witnesses from mentioning this evidence in the jury's presence. The second purpose militates toward the use of a pretrial motion, instead of merely an objection at trial, to avoid the introduction of evidence. *See* Wis. Stat. § 901.04(3) (hearings to be held outside jury's presence for certain specified admissibility questions and for any matter in the interests of justice). Even if a trial objection is sustained, the prosecutor's question or the witness's response may already have exposed the jury to prejudicial matters. Although the motion in limine is not mentioned in the Wisconsin Statutes, the court of appeals has recognized its common use to resolve pretrial issues. *See State v. Wright*, 2003 WI App 252, ¶¶ 37, 40, 268 Wis. 2d 694, 673 N.W.2d 386.

If a motion in limine is denied before trial, the defense can prepare to counter the adverse evidence. For example, if the court rules that evidence of other alleged crimes is admissible, the attorney might include this topic in the voir dire and the opening argument. Also, the pretrial decision on the motion in limine can preserve the issue for appeal, thus obviating the need for an objection in the jury's presence. For this purpose, on denial of the pretrial motion, the attorney should request a continuing objection. The objection should specify all the evidence in question.

Motions in limine are not specifically mentioned in Wis. Stat. § 971.31, which prescribes time limits for filing pretrial motions. Because a motion in limine is "capable of determination without the trial of the general issue," Wis. Stat. § 971.31(1), the defense may file it before trial. Arguably, it is subject to the general time limits for pretrial motions, *see* Wis. Stat. § 971.31(4), (5)(a), because it is not specifically excluded from those time limits.

In practice, however, many courts do not treat motions in limine as subject to the time limits of Wis. Stat. § 971.31(5)(a). Because evidentiary issues might not become apparent until after the defense attorney has obtained and reviewed discovery materials, the attorney cannot realistically specify these issues within the generally applicable time limits. Also, unlike motions to suppress illegally seized evidence, the evidentiary objections raised by motions in limine are not waived by failure to bring the motion before trial. *See* Wis. Stat. § 971.31(2). Because of the ambiguity over the timing of these motions, attorneys should acquaint themselves with local court rules and practices.

Form 5.55A, *infra*, is the basic form for a motion in limine to exclude prior convictions, *see* Wis. Stat. § 906.09, character evidence, *see* Wis. Stat. § 904.04(1), or evidence of other bad acts, *see* Wis. Stat. § 904.04(2); *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). In *Whitty*, the Wisconsin Supreme Court stated that evidence of other wrongful acts should be admitted sparingly and only when reasonably necessary. *Whitty*, 34 Wis. 2d at 297. Since then, the court of appeals has noted that the vast majority of appellate opinions have, despite the language of *Whitty*, approved the use of other acts evidence. *State v. Johnson*, 184 Wis. 2d 324, 341, 516 N.W.2d 463 (Ct. App. 1994). The supreme court has, however, reaffirmed the *Whitty* holding and the need for careful analysis of any attempt to introduce other acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 774–75 (reaffirming *Whitty* holding and need for analysis), 781–92 (applying analytical process to other acts question in *Sullivan*), 576 N.W.2d 30 (1998).

The other acts analysis consists of a three-part test: (1) is the evidence offered for a permissible purpose under Wis. Stat. § 904.04(2), (2) does the evidence have probative value under Wis. Stat. § 904.01, and (3) is the probative value substantially outweighed by the danger of unfair prejudice or other statutory considerations under Wis. Stat. § 904.03. *Sullivan*, 216 Wis. 2d at 772–73; *see also State v. Payano*, 2009 WI 86, ¶¶ 58–60, 320 Wis. 2d 348, 768 N.W.2d 832 (summarizing the general reasons to exclude other acts evidence and summarizing the framework for deciding admissibility).

Note. Wis. Stat. § 904.04(2)(b) allows evidence of similar acts by the accused, regardless of the victim, to be admissible in certain human trafficking, crimes against children, serious sex offenses, and domestic abuse crimes. Wis. Stat. § 904.04(2)(b) also allows certain sexual assault convictions to be used as character evidence to show that the defendant acted in conformity with that character.

Form 5.55A, *infra*, is also suitable for challenging other potential evidence on grounds of relevance, Wis. Stat. § 904.01, or danger of unfair prejudice, Wis. Stat. § 904.03.

Although certainly not an exhaustive list, the following are additional examples of issues potentially appropriate for a motion in limine:

1. Hearsay statements;

   a. Evidentiary challenges

Hearsay statements may be challenged under the evidence code, Wis. Stat. chs. 901–911, particularly Wis. Stat. ch. 908 (hearsay). The defense may address other evidentiary issues by citation to the applicable evidence rules, *see, e.g.*, Wis. Stat. chs. 904, 905 (privilege).

   b. Constitutional challenges

Hearsay statements of absent witnesses may be challenged under the Confrontation Clause, U.S. Const. amend. VI; Wis. Const. art. I, § 7; *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (holding that Confrontation Clause requires that the declarant be unavailable and that the defendant must have had a previous opportunity for cross-examination before *testimonial* hearsay statements may be admitted). “Testimonial” includes, at a minimum, formal court testimony and also statements made in response to police questioning. *See Crawford*, 541 U.S. at 51–53; *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements made during police interrogation are testimonial when, viewed objectively, circumstances show that primary purpose of interrogation is to gather evidence of past events).

The U.S. Supreme Court has addressed several hearsay-type Confrontation Clause challenges involving lab analysts (e,g., drugs, blood alcohol concentration, DNA). *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313–14 (2009), involved the state’s introduction of a lab report “certifying” that a substance was cocaine. The state did not call the analyst who authored the report. The Supreme Court held that the certificate was testimonial and that the admission of the certificate *of a non-testifying analyst* as prima facie evidence of composition, quality, and net weight of a substance violated the Sixth Amendment right to confrontation.

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the defendant was charged with operating while intoxicated. At trial, the analyst who tested the defendant’s blood and determined the blood alcohol level was unavailable for trial. The state called a substitute analyst familiar with the lab’s policies and testing procedures and who testified to the *contents* of the absent analyst’s report. The substitute analyst did not provide an independent opinion based on the data generated by the absent analyst. The Supreme Court found this violated the Confrontation Clause because the prosecution introduced a certification of lab results through an analyst who did not personally perform or observe the performance of the test reported. The Court noted the accused had a right to be confronted with the original analyst who, through certification, made assertions that the analyst received the blood sample intact with the seal unbroken, checked to make sure the forensic report number and the sample corresponded, performed a particular test adhering to a precise protocol, and left the remarks section blank indicating no circumstance or condition affected the sample's integrity or the analysis's validity. These representations, the Court held, related to past events and human actions not revealed in the raw, machine-produced data, and were the meat of cross-examination. Surrogate testimony could not convey what the original analyst knew or observed about the events the analyst certified nor expose lapses or lies on the part of the original analyst. The Court emphasized that once the state elected to introduce the original analyst's certification, that analyst became a witness against the accused and the right to confrontation attached. The Court found the assertions in the original analyst's report were contained within a formalized signed document and were testimonial.

Smith v. Arizona, 144 S. Ct. 1785 (2024), involved drug testing. An analyst from the Arizona state crime lab ran tests, prepared a set of typed notes, and signed a report. At trial, the original analyst was unavailable. Unlike *Bullcoming*, in which the surrogate analyst testified to the contents of the absent analyst's report, the state called a surrogate analyst who had formed an "independent" opinion after reviewing the absent analyst's test results, notes, and report. Over the defendant's objection that testimony from the substitute expert violated his right to confrontation, the Arizona courts held that the substitute analyst could testify because the absent analyst's statements were used for a non-hearsay purpose: to show the basis of the substitute analyst's "independent" opinion, not to prove their truth. Therefore, the Confrontation Clause did not apply.

The Supreme Court disagreed. The Court held in *Smith* that while state evidentiary rules may allow an expert to testify to an opinion that relies upon the factual assertions of a non-testifying witness in forming that expert's opinion (a non-hearsay purpose), those factual assertions are nonetheless offered for the truth of the matter asserted, and the Confrontation Clause applies. The Court remanded to the Arizona courts to determine whether the absent analyst's report was testimonial.

Smith v. Arizona seriously undermines, if not overrules, *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. In *Griep,* an operating-while-intoxicated case, the state called a surrogate expert to establish the defendant's blood alcohol content. In a situation similar to *Smith*, the surrogate expert based his opinion on forensic tests conducted by a non-testifying analyst at the Wisconsin State Laboratory of Hygiene. The Wisconsin Supreme Court upheld the decision to admit the surrogate testimony over an objection based on the Confrontation Clause, holding: "If the expert witness reviewed data created by the non-testifying analyst and formed an independent opinion, the expert's testimony does not violate the Confrontation Clause." *Griep*, 2015 WI 40, ¶ 40, 361 Wis. 2d 657.

In light of *Smith*, which found that "basis" testimony is offered for the truth of the matter asserted, and is therefore hearsay triggering the right of confrontation, *Griep* appears to have been overruled on that point. The issue that remains (in a *Griep* analysis) is whether the original analyst's assertions are testimonial. The majority in *Smith* endorsed a "primary purpose" test for generating the statement and in particular how the statement relates to future criminal proceedings. *Smith*, 144 S. Ct. at 1801–02. In remanding to the state of Arizona, the *Smith* opinion noted that the court must identify the out-of-court statement introduced and determine, given all the relevant circumstances, the principal reason it was made. The takeaway in Wisconsin is that lawyers can expect the state to argue that all statements an analyst makes are primarily created for administrative requirements and internal quality control rather than for use in court. As a practical matter, the defense should push for an expansive definition of "primary purpose" to win these arguments (i.e., why is the test being done if not so the analyst can later testify in court?).

The final area of lab analyst Confrontation Clause issues involves DNA. *See State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. In *Deadwiller*, the defendant argued his confrontation rights were violated when a state crime lab analyst was allowed to testify about the DNA results of a private laboratory when no one from the private laboratory testified. Turning to *Williams v. Illinois*, 567 U.S. 50 (2012), the Wisconsin Supreme Court concluded that the *result* in *Williams* should apply because "the facts of this case are strikingly similar to the facts in *Williams*," putting Deadwiller and Williams into "substantially identical positions." *Deadwiller*, 2013 WI 75, ¶ 32, 350 Wis. 2d 138. Under the facts of *Williams*, the U.S. Supreme Court did not generate a majority opinion as to whether the outside lab report was offered for the truth of the matter asserted, but a majority did find the outside lab DNA report was not testimonial; therefore, the right to confrontation did not apply.

In *Deadwiller* the Wisconsin Court of Appeals did not determine the appropriate test for whether statements are testimonial. *State v. Deadwiller*, 2012 WI App 89, ¶ 12, 343 Wis. 2d 703, 820 N.W.2d 149, *aff'd*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. Therefore, the court of appeals' opinion in *Deadwiller* offers little to no guidance, and courts in Wisconsin should apply the "primary purpose" test to determine if such reports are testimonial per the majority in *Smith*.

2. Testimony of witnesses not disclosed in discovery, *see generally supra* § 5.36;

3. Testimony of expert witnesses not disclosed in discovery or testimony going beyond the scope of the summary provided in discovery, *see generally supra* § 5.36;

4. Testimony of expert witnesses who lack the necessary expertise or specialized knowledge that will assist the jury in understanding the evidence, *see* Wis. Stat. § 907.02(1); and

5. Improper prosecutorial arguments, such as relying on matters outside the record, *see Embry v. State*, 46 Wis. 2d 151, 161, 174 N.W.2d 521 (1970); personal attacks on the defendant or the defense attorney, *see Callan v. Peters Constr. Co.*, 94 Wis. 2d 225, 244–47, 288 N.W.2d 146 (Ct. App. 1979); vouching for credibility of witnesses, *see State v. Davidson*, 2000 WI 91, ¶¶ 82, 89, 236 Wis. 2d 537, 613 N.W.2d 606; asking the jurors to put themselves in the place of the alleged victim ("Golden Rule" arguments), *see Rodriguez v. Slattery*, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972); and comments on the defendant's silence while not in custody, *see Salinas v. Texas*, 570 U.S. 178 (2013); *Griffin v. California*, 380 U.S. 609, 615 (1965). *But c.f. State v. Hoyle*, 2023 WI 24, 406 Wis. 2d 373, 987 N.W.2d 732 (stating that prosecutor's comment that victim's testimony was uncontroverted was proper because the state's comment discussed the evidence, not the defendant's silence (failure to testify)).

Caution. The plurality of the U.S. Supreme Court in *Salinas* made clear that *Griffin* does not apply to silence while not in custody, thus probably overruling *State v. Fencl*, 109 Wis. 2d 224, 232–38, 325 N.W.2d 703 (1982).

In addition to objecting to evidence or arguments, the defense attorney may use a motion in limine to request a determination in favor of admitting certain evidence. For example, the defense might seek an advance ruling that certain expert testimony will be admissible, rather than incurring the expense of having an expert travel to court only to be prohibited from testifying.

Practice Tip. In deciding whether to raise an issue before trial in a motion in limine, the attorney faces a tactical decision that depends on, among other factors, the judge hearing the case, the prosecutor, the strength of the legal authority supporting the defense's position, the likelihood that the motion may promote a favorable settlement, and the likelihood that the motion may result in the prosecution preparing the case more thoroughly than if the issue is deferred until trial. For example, a successful motion in limine on a confrontation issue might result in a continuance to allow the prosecutor to subpoena additional witnesses.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 5.55A Motion in Limine (CRM-0088)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ________________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION IN LIMINE

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order excluding from evidence the evidence listed below. The defendant brings this motion pursuant to Wis. Stat. §§ 901.03(3) and 901.04(3) on the grounds that admission of the evidence would violate U.S. Const. amends. V and XIV; Wis. Const. art. I, § 8; Wis. Stat. §§ 904.01–.04, 906.09, and *(specify other statutory provisions, if applicable)* of the Wisconsin Statutes; and *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386.

1. An order excluding any reference to the defendant's assertion of his or her right to remain silent by explicit invocation or by refusal to answer questions put to him or her. As grounds therefore, the defendant respectfully shows the court that admission of this evidence would violate the defendant's right to remain silent under U.S. Const. amends. V and XIV and Wis. Const. art. I, §§ 1, 2, 9, and 11. *See Schultz v. State*, 82 Wis. 2d 737, 264 N.W.2d 245 (1978).

2. An order excluding reference to any request by the defendant to speak to an attorney. As grounds therefore, the defendant respectfully shows the court that admission of this evidence would unfairly burden the defendant's right to counsel under U.S. Const. amends. V, VI, and XIV and Wis. Const. art. I, §§ 1, 2, 9, and 11. *See Schultz*, 82 Wis. 2d 737.

3. *(Specify any other potential evidence that should be excluded.)*

4. An order precluding the state and its representatives and witnesses or any other person from sharing proposed or completed witness testimony directly or indirectly with witnesses who have yet to testify or who are still under subpoena and may be recalled to the stand, pursuant to Wis. Stat. § 906.15(3) and *State v. Copeland*, 2011 WI App 28, ¶ 18, 332 Wis. 2d 283, 798 N.W.2d 250. The *Copeland* court wrote as follows:

> WISCONSIN STAT. § 906.15(3) provides that a court "may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended." Although this language does not explicitly reference communications between witnesses and attorneys, the only reasonable reading of the statute is that the court may restrict those communications when necessary to prevent indirect communications, sharing one witness's testimony with another. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶44, 46, 271 Wis. 2d 633, 681 N.W.2d 110 (we interpret statutory language to avoid unreasonable results and to effectuate the purpose of the statute). There is no practical difference between an attorney sharing the testimony of a witness with another witness who has yet to testify and the same two witnesses communicating directly with each other. The result is the same: the second witness receives information about the first witness's testimony. The second witness might then tailor his or her testimony to that of the first witness, potentially frustrating the fact finder's ability to discern the truth. Without the authority to restrict attorney-witness communication in these circumstances, courts would be powerless to stop noncomplying attorneys from circumventing sequestration orders.

Id. ¶ 14.

5. An order directing the state to identify for each witness all evidence excluded by order of this court and directing the state to specifically instruct each witness not to refer to evidence in the course of the witness's testimony.

6. An order directing that all witnesses and potential witnesses be excluded from the courtroom during opening statements and during testimony to preclude the possibility of the witnesses conforming or otherwise altering their testimony.

7. IN FURTHER SUPPORT, the defendant asserts:

(Specify the legal authorities and facts supporting the relief requested. If the motion addresses more than one item of potential evidence, use subheadings and numbered paragraphs for clarity.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XLIII. Prisoners and Out-of-State Witnesses [§ 5.56]

Commentary and Instructions for Forms 5.56A–5.56D

Form 5.56A	Defendant's Motion to Transport Prisoner (CRM-0089)
Form 5.56B	Order to Produce or Transport Prisoner (CRM-0090)
Form 5.56C	Defendant's Motion for Certificate Regarding Out-of-State Witness (CRM-0091)
Form 5.56D	Certificate Under Uniform Act for the Extradition of Witnesses (CRM-0092)

Forms 5.56A–5.56D, *infra*, address the practical difficulties of ensuring the presence in court of prisoners (both the defendant and defense witnesses) and out-of-state witnesses. For a more detailed discussion of the general rules and procedures to compel the attendance of witnesses, see Mark F. Neilson & Patrick K. Cafferty, *Compelling the Attendance of Witnesses in Criminal Cases*, Wis. Defender, Dec. 1998, at 1.

Prisoners Incarcerated in Wisconsin

When the defendant is incarcerated in the local county jail, the local sheriff generally brings the defendant to court hearings. Wis. Stat. § 885.60(2) provides that "[e]xcept as otherwise provided by law, a defendant in a criminal case" has the right "to be physically present in the court room at all critical stages of the proceedings." Many jails, however, are now equipped with audiovisual equipment to facilitate court proceedings in which the defendant remains in jail and participates by an audiovisual link to the courtroom. Wis. Stat. § 967.08 permits a number of pretrial proceedings to be conducted by audiovisual means, absent "good cause to the contrary."

When the defendant or a witness is confined in a state prison, an out-of-county jail, or another Wisconsin institution, a motion to transport is appropriate to request that the local sheriff bring the defendant or witness to a court hearing. Wis. Stat. §§ 782.44 and 782.45 set forth, respectively, the court's authority to issue a writ of habeas corpus to produce prisoners and the responsibilities of state and local institutions to honor this type of writ. Form 5.56A, Defendant's Motion to Transport Prisoner, *infra*, is a basic motion to have either the defendant or a witness produced in court. Some agencies prefer to save transportation costs by using the audiovisual court proceedings discussed above. Thus, depending on local practice and technology, the defense attorney may need to argue why personal presence is necessary. In the case of a witness, as opposed to the defendant, the attorney may need to convince the court that the witness is crucial to the defense.

Form 5.56B, *infra*, is the Order to Produce or Transport Prisoner. The attorney should submit this form as a proposed order accompanying Form 5.56A, *infra*. The attorney must ensure that the judge signs the order and that copies are provided both to the local sheriff (who generally will transport the prisoner) and to the records office of the institution where the prisoner is confined.

Out-of-State Witnesses

The Uniform Act for the Extradition of Witnesses in Criminal Actions, Wis. Stat. § 976.02, sets forth the procedure to require the attendance at trial of an out-of-state witness. Unless this act is followed, an attorney cannot compel a witness's attendance by out-of-state service of a subpoena. *See* Wis. Stat. § 885.01(2) (stating that subpoena may require attendance "from any part of the state"); *see also State v. Zellmer*, 100 Wis. 2d 136, 146, 301 N.W.2d 209 (1981).

Form 5.56C, *infra*, is a motion requesting a certificate from the circuit court stating that the named witness is a necessary witness. Form 5.56D, *infra*, is the Certificate Under Uniform Act for the Extradition of Witnesses. The attorney should submit this form as a proposed order accompanying Form 5.56C, *infra*. The attorney must ensure that the judge signs the order and that proceedings are initiated in the other state to obtain an order for the witness to appear in Wisconsin. To facilitate the out-of-state proceedings, Form 5.56D, *infra*, incorporates Form 5.56C, *infra* (and any supporting affidavits showing the need for the witness's testimony), and cites the other state's version of the Uniform Act for the Extradition of Witnesses.

These additional proceedings, outlined in Wis. Stat. § 976.02(2), ordinarily require the Wisconsin attorney to enlist the assistance of an agency or a private attorney in the other state to schedule and appear at the required hearing. The other state's attorney general's office or local prosecutor may initiate the proceedings in the other state, particularly if the Wisconsin judge sends the certificate with a cover letter requesting this assistance. *See* Neilson & Cafferty, *supra*, at 5.

To compel the attendance of an out-of-state prisoner, the attorney should follow the similar procedures of the Uniform Act for the Extradition of Prisoners as Witnesses, Wis. Stat. § 976.01. The order signed by the Wisconsin judge should direct Wisconsin officials (for example, the sheriff in the county that will temporarily house the prisoner) to comply with conditions specified by the out-of-state judge. *See* Wis. Stat. § 976.01(7).

Distribution

All forms

Original:	E-file
Copy:	Client; client file
Form 5.56B:	Copy of signed order to local sheriff and head of institution where defendant or witness is confined
Form 5.56D:	Copy of signed certificate to agency or attorney in other state who will assist in additional proceedings under Uniform Act for the Extradition of Witnesses

> ***Note.*** Form 5.56D, *infra*, should include as attachment(s) Form 5.56C, *infra*, and any supporting affidavits.

Form 5.56A Defendant's Motion to Transport Prisoner (CRM-0089)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO TRANSPORT PRISONER

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for a writ of habeas corpus to transport prisoner. The defendant brings this motion pursuant to Wis. Stat. § 782.44 on the grounds that the presence of *(the defendant) ((name), a material witness in this case)* is essential to a full and fair hearing.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested,
including the name of the prisoner to be transported,
the prisoner's location, and the date(s) on which
the prisoner's presence in court is requested)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

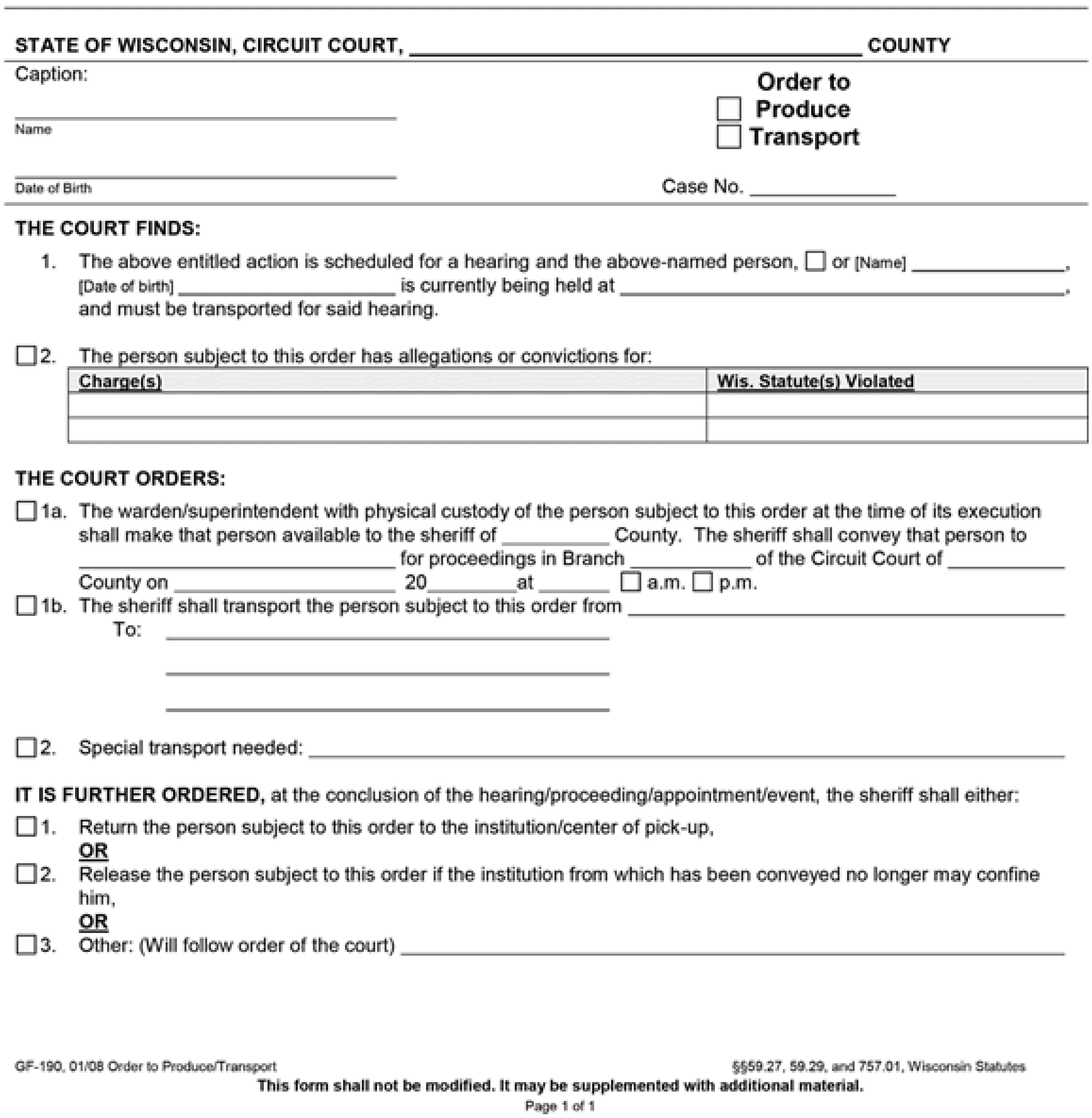
[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.56B Order to Produce or Transport Prisoner (CRM-0090)



STATE OF WISCONSIN, CIRCUIT COURT, ______________________________ **COUNTY**

Caption:

____
Name

____
Date of Birth

Order to
☐ **Produce**
☐ **Transport**

Case No. ______________

THE COURT FINDS:

1. The above entitled action is scheduled for a hearing and the above-named person, ☐ or [Name] ______________, [Date of birth] ______________ is currently being held at ______________________________, and must be transported for said hearing.

☐2. The person subject to this order has allegations or convictions for:

Charge(s)	**Wis. Statute(s) Violated**

THE COURT ORDERS:

☐1a. The warden/superintendent with physical custody of the person subject to this order at the time of its execution shall make that person available to the sheriff of __________ County. The sheriff shall convey that person to ______________________ for proceedings in Branch __________ of the Circuit Court of __________ County on ________________ 20________at ______ ☐ a.m. ☐ p.m.

☐1b. The sheriff shall transport the person subject to this order from ______________________________
To: ______________________________
____
____

☐2. Special transport needed: ______________________________

IT IS FURTHER ORDERED, at the conclusion of the hearing/proceeding/appointment/event, the sheriff shall either:

☐1. Return the person subject to this order to the institution/center of pick-up,
OR
☐2. Release the person subject to this order if the institution from which has been conveyed no longer may confine him,
OR
☐3. Other: (Will follow order of the court) ______________________________

GF-190, 01/08 Order to Produce/Transport §§59.27, 59.29, and 757.01, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 1

Form 5.56C Defendant's Motion for Certificate Regarding Out-of-State Witness (CRM-0091)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR CERTIFICATE
REGARDING OUT-OF-STATE WITNESSES

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for the issuance of a certificate under seal of the court, stating that *(name)* is a material witness in the above case whose testimony is required for *(one day/____days)*. The defendant brings this motion pursuant to Wis. Stat. § 976.02 on the grounds that *(name)* is a necessary defense witness in this case and the requested certificate is essential to protect the defendant's right to compulsory process under U.S. Const. amends. VI and XIV and Wis. Const. art. I, § 7.

IN FURTHER SUPPORT, the defendant asserts:

1. *(Summarize type of case and issue(s))*
2. *(Name)* is a material defense witness because *(specify anticipated testimony and its relevance)*.
3. *(Name's)* testimony is expected to last _____ day*(s)*
4. *(Name's)* last-known address is *(witness's address)*. *(State of witness's residence)* is a party to the Uniform Act for the Extradition of Witnesses in Criminal Actions. *(Cite foreign state's statute corresponding to Wis. Stat. § 976.02)*. Therefore, this court has the authority to grant this request under Wis. Stat. § 976.02(3)(a).

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 5.56D Certificate Under Uniform Act for the Extradition of Witnesses (CRM-0092)

STATE OF WISCONSIN	CIRCUIT COURT	*(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. (1.02)

(1.03) ____________________

Defendant

CERTIFICATE UNDER UNIFORM ACT
FOR THE EXTRADITION OF WITNESSES

Pursuant to the Uniform Act for the Extradition of Witnesses in Criminal Actions, Wis. Stat. § 976.02(3)(a), and on the defendant's motion, the Honorable *(judge's name)*, Circuit Court for *(1.01)* County, Wisconsin, hereby issues this certificate under seal of the court. The court certifies that it has found the following facts:

. A criminal action is pending involving the above-named parties in Circuit Court, Branch _____, *(1.01)* County, Wisconsin, in which the undersigned is the presiding judge.

2. *(Name)* is a material witness in this action, and (his/her) presence is required for a jury trial in this court on the date and at the time specified below:

Date: ______________________________

____
Time: ______________________________
Place: ______________________________ County Courthouse, *(address)*

3. The attached *(motion and/or affidavit)*, which *(is/are)* incorporated as part of this certificate, *(provide(s))* the basis for the court's conclusion that *(Name)* is a material witness and that *(Name)* is likely to be located at *(address or location where service of witness is requested)*.

4. The witness will be required to attend this trial for *(one day/____days)*.

   This certificate shall be presented to a judge of the court of record in __________ County, *(state in which witness is located)*, for the purpose of fixing a time and place for a hearing and issuance of an order directing the above-named witness to appear for such hearing.

5. *(Other state)* has adopted the Uniform Act for the Extradition of Witness. *(Cite foreign state's statute corresponding to Wis. Stat. § 976.02.)* Thus, the court of record in ________ County, *(other state)* is authorized to act pursuant to this certificate to accomplish extradition of an out-of-state witness.

XLIV. Motion to Withdraw as Counsel [§ 5.57]

Commentary and Instructions for Form 5.57A

Form 5.57A Motion to Withdraw as Counsel (CRM-0093)

Form 5.57A, *infra*, is a motion to withdraw as counsel before the case has been completed in the circuit court. Before an attorney may discontinue representation in a pending case, the attorney must bring such a motion or otherwise receive permission from the court to withdraw. *See State v. Cummings*, 199 Wis. 2d 721, 748–49, 546 N.W.2d 406 (1996) (noting that request is addressed to court's "sound discretion"). Thus, this motion or a stipulated substitution of counsel is recommended if the case has not yet proceeded to judgment (including sentencing, if the defendant has been convicted).

Potential reasons for withdrawal include conflicts of interest, inability of the attorney to continue to work on the case for personal reasons, the client's request for a change of attorney, and the client's lack of cooperation (or other oppositional conduct toward the attorney).

When, as is often the case, the basis for a motion to withdraw stems from communications between the attorney and the client, the defense attorney must be careful to preserve confidentiality. Absent an exception to this ethical duty, *see* SCR 20:1.6, the attorney cannot describe specific statements or actions of the client that support the request to withdraw. If the court seeks specific reasons that the attorney cannot ethically reveal, the attorney should cite the duty of confidentiality as the reason that the motion provides only general grounds for withdrawal.

A disagreement between the attorney and the client about whether to go to trial should not, absent other circumstances, serve as the basis for a motion to withdraw. The attorney should respect the client's decision and represent the client, to the best of the attorney's ability, on whatever course the client chooses to pursue. An attorney should be willing to try a case and willing to advocate enthusiastically at trial despite the attorney's personal belief that the client should have accepted a plea offer.

Conversely, if the client insists on the attorney's complicity in illegal behavior, such as the presentation of false evidence (described as such by the client), the attorney may need to move to withdraw. *Cf. State v. McDowell*, 2004 WI 70, ¶¶ 43, 45–46, 272 Wis. 2d 488, 681 N.W.2d 500 (setting high standard for attorney's "knowledge" of client's intent to commit perjury, which ordinarily must be based on client's stated intent to testify falsely, but stating that attorney should seriously consider moving to withdraw when unable to dissuade client from testifying falsely).

The attorney continues to represent the client while the motion to withdraw is pending. *See* SCR 20:1.16(c) (attorney must comply with applicable law regarding notice and permission from court). If the attorney has been appointed by the State Public Defender or by the court, the attorney should advise the client regarding the procedures to follow to obtain successor counsel. The attorney should also provide the client's file to successor counsel, absent instructions from the client to the contrary. *See generally* SCR 20:1.16(d) (attorney's duty to take reasonable steps on termination of representation to protect client's interests).

Distribution

Original:	Clerk of court
Copy:	District attorney; State Public Defender (if applicable); client; client file

Notes

Form 5.57A Motion to Withdraw as Counsel (CRM-0093)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S ATTORNEY'S MOTION TO WITHDRAW AS COUNSEL

The undersigned attorney for the defendant, appearing specially and reserving the right to challenge this court's jurisdiction, moves the court for an order relieving the attorney from further representation of the defendant in this case. The defendant's attorney brings this motion pursuant to SCR 20:1.16 on the grounds that *(summarize basis for relief requested, for example, defendant has asked attorney to withdraw, attorney has learned of conflict of interest with another client or former client)*.

IN FURTHER SUPPORT, the defendant asserts:

(Specify the facts supporting the relief requested;
however, do not include any facts that are
confidential under SCR 20:1.6)

The undersigned has provided the defendant with notice of this motion and has advised the defendant of the opportunity to be heard on this motion. *See State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Chapter 6

Negotiating a Plea

I. Introduction [§ 6.1]

Most criminal cases are settled by a plea of guilty or no contest or by means of various forms of deferred prosecution agreements. For example, in the 12-month period ending June 30, 2022, about 90% of federal criminal cases were resolved by a guilty plea. *See* U.S. Courts, *Statistics & Reports*, *Table D-4—U.S. District Courts – Criminal Statistical Tables for the Federal Judiciary (June 30, 2022)*, https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2022/06/30 (last visited Aug. 12, 2024). The prosecutor and the defense attorney discuss the issues in the case and come to some resolution that can, with the client's agreement and the court's acceptance, settle the case without a trial. This process is variously referred to as plea negotiations or plea bargaining. Although sometimes viewed with distrust or censure, plea bargaining is a well-established and important part of our adversarial system.[1]

There are disadvantages to settling a case. By agreeing to settle, the client waives the right to trial and thus gives up the opportunity for an acquittal. Moreover, under the guilty plea waiver rule, the client waives most appellate claims by entering a plea of no contest or guilty, except appeals involving motions to suppress evidence or motions challenging admissibility of a statement of a defendant. *See* Wis. Stat. § 971.31(10) ("An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.").

On the other hand, settlement often results in a reduction of charges and provides some degree of certainty about the outcome of the case. In addition, the client is spared the stress, hardship, and, if privately retained, expense of having to go through a jury trial.

Because so many criminal cases are settled, the ability to negotiate effectively is of paramount importance to the defense attorney. As discussed at section 6.14, *infra*, the use of "principled negotiation" tactics can help defense counsel reach advantageous plea agreements. Another key to effective negotiating is the willingness to go to trial when negotiations are deadlocked, thus a lawyer who never tries cases has little credibility in negotiations.

When a client faces the decision to either accept a settlement offer or go to trial, the attorney must retain the role of advisor and refrain from acting as the decision-maker. Although many clients will want the lawyer to make the decision, the lawyer should not give in to this temptation. The lawyer should consider all aspects of the case and inform the client of possible outcomes that could arise. The lawyer can offer his or her opinion on the likelihood of certain scenarios occurring, but the client ultimately must make the decision based on the pros and cons of each option as set forth by the lawyer.

The attorney should also impress on the client that there are no guarantees. The attorney can recommend a course of action, but ultimately the client's life and liberty are at stake. If the attorney's predictions are wrong, the attorney walks out of court at the end of the case while the client ends up behind bars.

This chapter is a guide to plea negotiations and the plea decision. The Law and Practice of Plea Negotiations, *infra* §§ 6.2–.33, provides a general overview. The Checklist of Factors Affecting the Plea Decision, *infra* § 6.34, serves as a quick reference for the attorney in analyzing the plea decision. The Checklist for Advising the Client on the Plea Decision, *infra* § 6.35, lists those matters that the lawyer should discuss with the client before the plea decision is made.

Forms 6.37A to 6.37C, *infra*, will help the lawyer draft and execute a deferred prosecution agreement, which can result in a dismissal or reduction of charges conditioned on the defendant's compliance with the agreement.

Forms 6.37D and 6.37E, *infra*, are parallel forms to be used when seeking a deferred judgment agreement.

Forms 6.38A and 6.38B, *infra*, can be used when consolidating cases from various counties into one county, so that one court can dispose of all of the client's pending or potential cases. The defense attorney should consider a consolidation only when it is to the client's advantage. For example, if a defendant serving a prison sentence on charges from one county also faces charges from other counties, consolidation may not be the route to pursue. Instead, defense counsel might consider approaching the other counties where charges are pending and seeking individual agreements to dismiss or not to prosecute.

II. The Law and Practice of Plea Negotiations [§ 6.2]

A. In General [§ 6.3]

The constitutional validity of plea bargaining was recognized in *Brady v. United States*, 397 U.S. 742 (1970). Wisconsin has recognized plea bargaining as a legitimate method of expediting the criminal court process. *See State ex rel. White v. Gray*, 57 Wis. 2d 17, 203 N.W.2d 638 (1973). Wis. Stat. §§ 971.06, 971.08, and 971.09 deal with pleas generally and the taking of guilty and no-contest pleas in Wisconsin circuit courts.

The American Bar Association standard relating to guilty pleas recognizes the need for, and appropriateness of, plea discussions and plea agreements. *See ABA Standards for Criminal Justice—Pleas of Guilty* § 3.1 (3d ed. 1999) [hereinafter *ABA Standards—Pleas of Guilty*], https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#3.1 (last visited Oct. 31, 2022).

B. The Parties [§ 6.4]

Proper parties in the negotiation process include the defendant, the defense attorney, and the prosecuting attorney. *Farrar v. State*, 52 Wis. 2d 651, 191 N.W.2d 214 (1971). Other law-enforcement officials, such as probation agents or case detectives, should not participate in negotiations or make promises in exchange for a plea. *Id.* at 655–57. Offers from law enforcement or probation agents are non-binding and thus any specific negotiation must be made with the prosecutor's office. However if the defense makes an agreement with the prosecutor's office, law enforcement cannot seek a result outside of that agreement. Statements of investigating officers may be imputed to the prosecutor for the purpose of reviewing prosecutorial compliance with a plea agreement. *State v. Matson*, 2003 WI App 253, ¶¶ 22–25, 268 Wis. 2d 725, 674 N.W.2d 51.

The district attorney has great discretion in negotiating plea bargains. *Mallon v. State*, 49 Wis. 2d 185, 181 N.W.2d 364 (1970). Further, before arraignment, the district attorney has discretion to amend the charges without the court's approval. Wis. Stat. § 971.29(1); *State v. Conger*, 2010 WI 56, ¶ 16, 325 Wis. 2d 664, 797 N.W.2d 341. The district attorney does not violate the defendant's due process rights by carrying out a threat to bring additional or more serious charges if the defendant does not plead to the pending charges. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The district attorney's discretion, however, is not unfettered "but must be rooted in the public interest considering prompt disposition of cases, protection of the public, the seriousness of the offense, and respect for the law." *State ex rel. White v. Gray*, 57 Wis. 2d 17, 29–30, 203 N.W.2d 638 (1973).

Crime victims or victims' families have a right to attend court proceedings (Wis. Stat. § 950.04(1v)(b)), to consult with the prosecution (Wis. Stat. § 950.04(1v)(j)), and to provide statements to the court concerning the sentence to be imposed (Wis. Stat. § 950.04(1v)(m)). Crime victims in Wisconsin now have additional rights pursuant to Marsy's Law, which a majority of Wisconsin voters approved in 2020. *See* Wis. Const., art. I, § 9m. Wisconsin district attorneys use victim-witness coordinators to keep in contact with victims and witnesses. These persons often solicit input from victims and keep them advised of plea negotiations.

C. The Court's Role [§ 6.5]

The plea bargaining process must be open to judicial scrutiny. Therefore, the trial judge should not participate in the plea discussions. *See, e.g.*, *State v. Williams*, 2000 WI 78, ¶ 26, 236 Wis. 2d 293, 613 N.W.2d 132; *State v. Betts*, 129 Wis. 2d 1, 383 N.W.2d 876 (1986); *In re Amend. of Rules of Civil & Criminal Procedure: Sections 971.07 and 971.08, Stats.*, 128 Wis. 2d 422, 383 N.W.2d 496 (1986). Furthermore, the trial judge should not indicate approval of the plea bargain, or any recommended sentence, before accepting the plea. *See, e.g.*, *Williams*, 2000 WI 78, ¶ 26, 236 Wis. 2d 293; *State v. Erickson*, 53 Wis. 2d 474, 192 N.W.2d 872 (1972).

The sentencing court is not bound by the prosecutor's sentence or disposition recommendation in the plea agreement between the state and the defendant. *See, e.g.*, *Williams*, 2000 WI 78, ¶ 34, 236 Wis. 2d 293; *State v. McQuay*, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990). The circuit court should scrutinize a plea agreement to ensure that it is in the public interest—that is, to ensure that (1) the agreement takes into account the benefit to the public in securing a prompt disposition of the case and the importance of a disposition that protects the public; and (2) the agreement neither depreciates the seriousness of the offense nor promotes disrespect for the law. *State ex rel. White v. Gray*, 57 Wis. 2d 17, 30, 203 N.W.2d 638 (1973). The circuit court may reject a promise by the prosecutor to dismiss charges as part of a plea bargain if the dismissal is not in the public interest. *See, e.g.*, *State v. Conger*, 2010 WI 56, ¶¶ 15–27, 325 Wis. 2d 664, 797 N.W.2d 341; *State v. Kenyon*, 85 Wis. 2d 36, 270 N.W.2d 160 (1978).

In *White*, 57 Wis. 2d at 24, the Wisconsin Supreme Court adopted the 1968 version of the ABA standard relating to the voluntariness of pleas:

> The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney, the defendant, and defense counsel, if any, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

ABA Standards for Criminal Justice–Pleas of Guilty § 1.5 (1968). Every plea bargain entails some degree of coercion, because very few defendants would plead guilty absent the threat of conviction and punishment following a trial. The wish to avoid harsher punishment, however, does not make the resulting plea involuntary:

> [A] plea otherwise valid is not involuntary because induced or motivated by the defendant's desire to get the lesser penalty. A voluntary and intelligent choice always involves two or more alternatives, each having some compelling power of acceptance. The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made. The distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus. When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced.

Rahhal v. State, 52 Wis. 2d 144, 151–52, 187 N.W.2d 800 (1971). The voluntariness of a plea bargain that contemplates special concessions to another person, especially a loved one, should be carefully scrutinized for any unusual psychological coercion. *White*, 57 Wis. 2d at 29. *But cf. State v. Goyette*, 2006 WI App 178, ¶¶ 23–32, 296 Wis. 2d 359, 722 N.W.2d 731 (upholding voluntariness of "package plea agreement" in which all co-defendants had to plead guilty for any to receive the benefit of reduced charges).

The terms of any plea bargain should be made a matter of record. *See, e.g.*, *State v. Hampton*, 2004 WI 107, ¶ 30, 274 Wis. 2d 379, 683 N.W.2d 14; *State v. Lee*, 88 Wis. 2d 239, 276 N.W.2d 268 (1979). The record assists in appellate review of claims that the bargain was not kept. *White*, 57 Wis. 2d at 22. One possible exception is when the client may not want relevant information publicly disclosed in open court, e.g., if the client has worked as a confidential informant for the police. In this case the defense attorney should discuss with the client the pros and cons of not disclosing such information. *But see State v. Frey*, 2012 WI 99, ¶ 48, 343 Wis. 2d 358, 817 N.W.2d 436 (holding that agreements not to reveal relevant information to sentencing court are contrary to public policy).

D. Breach of the Plea Bargain [§ 6.6]

1. In General [§ 6.7]

Challenges relating to breaches of plea agreements have their roots in contract law, but they are broader because of the accused's criminal rights. *State v. Rivest*, 106 Wis. 2d 406, 413, 316 N.W.2d 395 (1982). "Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate 'safeguards[.]'" *Id.* (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

The party alleging a breach of a plea agreement bears the burden of proving the breach and its substantial and material character. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 643, 579 N.W.2d 698 (1998); *see also Rivest*, 106 Wis. 2d at 414 (constitutional due process requirements of "decency and fairness" are satisfied when the burden is placed on the party seeking to vacate the agreement to establish the breach and that the breach is sufficiently material to warrant releasing the party from its promises). The burden is on the party alleging a breach to show, by clear and convincing evidence, that a breach occurred and that the breach is material and substantial. *State v. Deilke*, 2004 WI 104, ¶ 13, 274 Wis. 2d 595, 682 N.W.2d 945 (citing *State v. Bangert*, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986)); *State v. Rock*, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979)).

A material and substantial breach occurs when one party withholds the benefit for which the other party bargained. *See, e.g.*, *State v. Williams*, 2002 WI 1, ¶ 38, 249 Wis. 2d 492, 637 N.W.2d 733; *State v. Quarzenski*, 2007 WI App 212, ¶ 18, 305 Wis. 2d 525, 739 N.W.2d 844. The appropriate remedy for a material and substantial breach of a plea agreement depends on the totality of the circumstances. *State v. Deilke*, 2004 WI 104, ¶ 25, 274 Wis. 2d 595, 682 N.W.2d 945. "A court must examine all of the circumstances of a case to determine an appropriate remedy for that case, considering both the defendant's and State's interests." *State v. Robinson*, 2002 WI 9, 249 Wis. 2d 553, ¶ 48, 638 N.W.2d 564, *overruled on other grounds by State v. Kelty*, 2006 WI 101, ¶ 39, 294 Wis. 2d 62, 716 N.W.2d 886.

The prosecutor can cure a material and substantial breach of the plea agreement at the sentencing hearing. For example, if defense counsel makes a timely objection, the prosecutor can then immediately correct the error. *See, e.g., State v. Nietzold,* 2023 WI 22, 406 Wis. 2d 349, 986 N.W.2d 795 (plea agreement had stated that state was free to argue for prison and state agreed not to recommend a specific term of years, but prosecutor initially advocated for specific term of imprisonment; when defense counsel objected, state retracted and corrected its mistake).

2. By the Accused [§ 6.8]

A common example of a defendant's breach of an agreement is the failure to testify against others or to assist in an investigation. *See State v. Rivest*, 106 Wis. 2d 406, 417, 316 N.W.2d 395 (1982). This breach may be so obviously material that the court is not required to hold an evidentiary hearing. *State v. Toliver*, 187 Wis. 2d 346, 357–58, 523 N.W.2d 113 (Ct. App. 1994).

3. By the Government [§ 6.9]

An example of a prosecutorial breach of a plea agreement is the failure to make an agreed-on recommendation or statement regarding an appropriate sentence. *See, e.g.*, *State v. Williams*, 2002 WI 1, ¶¶ 47–52, 249 Wis. 2d 492, 637 N.W.2d 733 (discussing prosecutor's statement implying that she no longer agreed with recommended sentence); *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997) (discussing prosecutor's agreement not to make any recommendation); *State v. Wood*, 2013 WI App 88, 349 Wis. 2d 397, 835 N.W.2d 257 (discussing prosecutor's comments and finding no breach occurred).

If the government fails to honor a plea agreement that was entered into on the government's promises, the defendant may withdraw the plea or demand specific performance of the agreement, at the discretion of the court. *Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) (citing *Santobello v. New York*, 404 U.S. 257 (1971)).

If the prosecution breaches the agreement, defense counsel should immediately confer with the client on whether to object. Failure to object or to confer with the client on the issue could result in a claim of ineffective assistance of counsel. *See Smith*, 207 Wis. 2d 258. Furthermore, the defense must enter its objection immediately; failure to object contemporaneously with the breach waives the issue. *See State v. Smith*, 153 Wis. 2d 739, 451 N.W.2d 794 (Ct. App. 1989).

The prosecution may not indirectly undermine its agreement by suggesting that it favors a more serious sentence than recommended. *State v. Harvey*, 2006 WI App 26, ¶ 32, 289 Wis. 2d 222, 710 N.W.2d 482. Thus, if the investigating officer recommends a harsher sentence, the officer's statements may constitute a breach of a plea agreement. *See State v. Matson*, 2003 WI App 253, ¶¶ 25, 27, 268 Wis. 2d 725, 674 N.W.2d 51. In contrast to the prosecutor and the police, however, the author of a presentence report is not considered an agent of the state and is therefore not bound by a plea agreement. *State v. McQuay*, 154 Wis. 2d 116, 130–31, 452 N.W.2d 377 (1990). Similarly, a victim (or victim's family) is not foreclosed by a plea agreement from advocating for a harsher sentence. *See* Wis. Stat. § 950.04(1v)(L), (m) (prosecutor's duty to contact victim and victim's right to make statement regarding sentencing); *Harvey*, 2006 WI App 26, ¶ 42, 289 Wis. 2d 222.

Practice Tip. Although the primary concern of most defendants is minimizing potential imprisonment, the defense attorney should attempt to obtain favorable recommendations on other sentence components. If a plea agreement addresses only the issue of imprisonment, the prosecution may argue for a maximum term of probation (or, if the recommendation is for a bifurcated sentence, for a maximum term of extended supervision). *See State v. Quarzenski*, 2007 WI App 212, ¶¶ 20–24, 305 Wis. 2d 525, 739 N.W.2d 844.

E. Ethical Considerations [§ 6.10]

1. Problem Areas [§ 6.11]

1. Does an attorney have an ethical obligation to enter into plea negotiations?

The supreme court rules do not require a lawyer to do anything specific in any case, but they do require competent and diligent representation. Even if a client proclaims innocence and demands a trial, it is likely that the defense counsel would not be competently representing the client if they did not at least try to convince the district attorney to dismiss the case. Although there is no "thou shalt negotiate" rule per se, it would probably require an unusual set of circumstances to find that an attorney is competent even if he or she did not at least explore resolution of a matter short of trial.

2. How far may a defense attorney go in trying to persuade a client to plead guilty or no contest?

When a client faces the decision to either accept a settlement offer or go to trial, the attorney must retain the role of advisor and refrain from acting as the decision-maker. The lawyer should consider all aspects of the case and inform the client of possible outcomes that could arise. The lawyer can offer an opinion on the likelihood of certain scenarios occurring, but the client ultimately must make the decision based on the pros and cons of each option as explained by the lawyer, even if the lawyer disagrees with the choice.

3. May a defense attorney ethically permit a client to plead guilty or no contest if the defendant does not admit culpability?

Yes; SCR 20:1.2(a) explicitly requires lawyers to abide by the client's decision as to what plea to enter.

4. May an attorney allow a client to plead guilty or no contest if the attorney does not believe the client is guilty?

Yes; the attorney is the client's advisor, but the ultimate decision as to how to proceed in a case lies with the client.

5. May an attorney allow a client to plead guilty or no contest if the attorney believes the client is mentally ill?

This one is a bit dicey. If an attorney suspects that the client is incompetent, then he or she must raise the issue of competency with the court. If the court finds the client competent and the attorney disagrees, he or she can allow the individual to plead, but when asked by the court if the plea is intelligent, knowing, and voluntary, the attorney should say "no" on the basis of the competency issue previously raised. If the defense attorney believes that the client is incompetent for a different reason than previously addressed in the last competency finding, then the attorney should raise competency again.

Because mental illnesses relate to pleas of not guilty by reason of mental disease or defect, the decision as to whether to plead not guilty by reason of mental disease or defect rests solely with the client.

2. The Law and Standards [§ 6.12]

A common question asked by clients is, "What is the difference between a plea of guilty and a plea of no contest?" The only legal difference is that a guilty plea is considered an admission for purposes of later civil litigation. A no contest plea, by contrast, cannot be used as an admission in later civil litigation. Wis. Stat. § 904.10; *Kustelski v. Taylor*, 2003 WI App 194, ¶ 18, 266 Wis. 2d 940, 669 N.W.2d 780. Therefore, if there is any possibility that the conduct for which the client is pleading could be the subject of later civil litigation, the safest course of action is to plead no contest rather than guilty. In addition, many clients want to enter a plea and yet not affirmatively admit guilt. A no contest plea may be more palatable than a guilty plea for that reason.

But what if the client affirmatively claims innocence and yet also wants to take a plea offer? It is constitutionally permissible for a court to accept a defendant's guilty plea, even though that plea is accompanied by protestations of innocence and contains a waiver of trial without an admission of guilt, as long as there is a factual basis for the plea. *North Carolina v. Alford*, 400 U.S. 25 (1970). Such pleas are known as *Alford* pleas. Wisconsin has recognized the validity of *Alford* pleas. *See Johnson v. State*, 53 Wis. 2d 787, 193 N.W.2d 659 (1972); *State v. Stuart*, 50 Wis. 2d 66, 183 N.W.2d 155 (1971); *State v. Johnson*, 105 Wis. 2d 657, 314 N.W.2d 897 (Ct. App. 1981).

An *Alford* plea does not, however, protect a defendant from a probation condition that has the effect of requiring an admission of the criminal conduct in question. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 630–34, 579 N.W.2d 698 (1998). In *Warren*, Schwarz entered into an Alford plea for a sexual assault and was placed on probation and given a condition which required him to complete sex offender therapy and admit that he was guilty of the sexual assault. *Id.* After Schwartz failed to admit guilt during the probationary term, the court upheld the State's revocation of Schwarz's probation. *Id.*

Alford pleas are rarely entered in everyday practice in most Wisconsin counties. Many judges will not accept *Alford* pleas, or will do so only when unusual circumstances exist. If an *Alford* plea is being considered, it may be wise to inquire with the prosecutor or with other defense attorneys in that jurisdiction to find out if an *Alford* plea is likely to be accepted.

The cases cited above do not directly address the defense attorney's dilemma of whether to allow a client who professes innocence to plead guilty or no contest. The clear implication, however, is that the client has a right to plead guilty to a charge while maintaining innocence; if the decision to plead or go to trial is the defendant's alone, the client is entitled to the effective assistance of counsel in exercising that right. The ABA standards relating to the defense function state that "[t]he decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter; (ii) whether to accept a plea agreement; [and] (iii) whether to waive jury trial." *ABA Standards for Criminal Justice—Defense Function* § 5.2 (3d ed. 1993) [hereinafter *ABA Standards—Defense Function*].

Defense counsel should not let the client's stated desire to plead guilty prevent counsel from independently investigating the facts. *ABA Standards—Defense Function* § 4.1 (duty to investigate); *State v. Harper*, 57 Wis. 2d 543, 553 n.3, 205 N.W.2d 1 (1973). However the attorney should consult with the client to insure they will not investigate the case in such a way as to harm the client's interests. Additionally, the accused should have the full and careful advice of counsel. *ABA Standards—Pleas of Guilty*, *supra* § 6.3, at § 3.2 (relationship between defense counsel and client). The defense attorney does not have the right to demand that the client follow the attorney's advice. *Id.* The attorney does, however, have the right, and duty, to engage in fair persuasion and to urge the client to follow the course of action the attorney believes is best.

Fair persuasion does not include talking the client into pleading guilty because of the attorney's reluctance to try cases. Nor does it include coercive tactics on the attorney's part that seek to overcome the client's free and informed decision. Talking a client into a plea that he or she does not truly wish to enter will haunt the lawyer as well as the client.

Multiple representation (the representation of multiple clients involved in the same offense or course of conduct) can raise serious conflict-of-interest problems in plea negotiations. *See* SCR 20:1.7 (conflict of interest: general rule); *see also Holloway v. Arkansas*, 435 U.S. 475 (1978); *State v. Love*, 227 Wis. 2d 60, 69, 594 N.W.2d 806 (1999) (holding that potential for conflict of interest exists in almost every instance of representing co-defendants; potential may be strongest at sentencing phase because of constraints on arguing unique factors on behalf of each client).

3. Immigration and Other Collateral Consequences: Scope of Representation [§ 6.13]

The U.S. Supreme Court has held that, because of the close connection between criminal convictions and deportation, defense attorneys must provide information to noncitizen clients about potential immigration consequences. *Padilla v. Kentucky*, 559 U.S. 356, 366–69 (2010). Declining to characterize deportation as either a direct or collateral consequence of a criminal conviction, the Court stated that when the potential for deportation is clear from the plain language of the immigration statute, effective assistance of counsel includes providing accurate information about this potential consequence. *Id.* at 368–69.

SCRs 20:1.1 (Competence), 20:1.2 (Scope of representation), and 20:1.4 (Communication) are potentially relevant when a client is concerned about indirect consequences. Although an attorney might assume that representation in a criminal case is limited to the issues presented within that case, a client might assume—or expect—that the attorney will provide representation regarding all potential consequences. Therefore, the attorney should communicate clearly with the client about the scope of the attorney's representation.

> ***Practice Tip.*** If a client is concerned about a *collateral consequence*, i.e. a potential effect of a conviction that goes beyond the judgment in the criminal case, the defense attorney should provide reasonable information and advice regarding that consequence. The attorney should keep in mind that clients do not always appreciate the distinction between direct and indirect consequences.
>
> Although the attorney cannot anticipate every collateral consequence that might concern a client, communication with the client helps to identify such consequences. For example, by asking a client about occupational goals, the attorney might learn that the client is interested in a profession that requires licensing. The attorney should then discuss with the client the extent of assistance the attorney can provide with the licensing issue, and the limits to that assistance.
>
> For a listing of some of the more commonly encountered collateral consequences, refer to the checklist at section 6.35, *infra*. For an in-depth discussion of collateral consequences, refer to Margaret Colgate Love et al., *Collateral Consequences of Criminal Conviction: Law, Policy, and Practice* (2016 ed.). *See also* Davorin J. Odrcic et al., *Immigration Consequences of Wisconsin Criminal Offenses* (State Bar of Wis. 2d ed. 2021 & Supp.).

> ***Note.*** The Wisconsin State Public Defender's office provides immigration practice coordinators who will provide advice on this issue.

F. Defense Strategies [§ 6.14]

This section describes basic principles of plea negotiation based on the theory of "principled negotiation," also known as "negotiation on the merits." Principled negotiation was first described in the Harvard Negotiation Project's classic text on negotiation, Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (2d ed. 1991). A new defense attorney would be well advised to read *Getting to Yes* as well as other books by the Harvard Negotiation Project, including Douglas Stone et al., *Difficult Conversations: How to Discuss What Matters Most* (rev. ed. 2010) and Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2005).

As described in *Getting to Yes*, principled negotiation is based on four basic points:

1. People: separating the people and the problem.
2. Interests: focusing on interests rather than positions.
3. Options: generating possible solutions before deciding what course to take.
4. Criteria: insisting that the end result be based on an objective standard.

Getting to Yes, *supra*, at 10–11.

Separating the people from the problem includes recognizing that everyone involved in the plea negotiation process is a human being with human emotions. This includes not only the prosecutor but those with whom the prosecutor has to work: a group which may include the police, the alleged victim, and the prosecutor's supervising attorney. The defense attorney should resist the temptation to allow a negotiation to become a test of wills between the prosecutor and the defense attorney, or, on the other extreme, to allow personal friendship with the prosecutor to supersede zealous advocacy for the client. By separating the people from the problem, the defense attorney and prosecutor can then focus on the underlying interests at stake.

The second point of principled negotiation, focusing on interests, avoids the tendency for plea negotiation to become a zero-sum "bidding war" where the two sides argue up or down. Defense counsel should learn the client's interests in the case. Then defense counsel should investigate how those interests might coincide with, or at least not conflict with, the prosecutor's interests.

Knowing the client's interests is especially important if those interests differ from the typical ones. Almost every criminal defendant wants the case dismissed, or failing that, to avoid going to jail or prison. But other interests may be less common. For example, a client may be trying to join the military, and thus has an interest in avoiding a felony conviction or a misdemeanor crime of domestic violence that would invoke a firearms ban.

Defense counsel must also be aware of the prosecutor's interests. Prosecutors have heavy caseloads and need to move their cases forward. The client may want to delay the case, but prosecutors generally want cases resolved quickly. On the other hand, prosecutors have time to take only a tiny fraction of cases to trial, so they may be interested in reaching a plea agreement, if at all possible. Otherwise, they too may try to delay cases approaching the trial date.

The third point of principled negotiation is generating options, i.e., ways to satisfy each side's interests, by brainstorming with both the client and the prosecutor. For example, defense counsel might learn that the client is planning to move to Florida (for some reason this scenario most frequently arises during Wisconsin's winter months). Assuming that the client's plan is credible (e.g., evidence of a job offer in Florida), the defense and the prosecutor could devise a plea agreement that would benefit both sides, e.g., a short jail sentence that leaves the client able to move to Florida without the additional complication of being on probation in Wisconsin.

To generate options and assess their validity, defense counsel should always know the client's best alternative to a negotiated agreement, or *BATNA*. The BATNA is what happens if the defense attorney walks away from the negotiating table without an agreement. Knowing the BATNA is absolutely critical in successful plea negotiation. In some cases, the BATNA will be taking a case to jury trial. But what if, as is so often the case, the client has already given the police a full confession and there is no suppression motion or other defense? There still is a BATNA, which is likely to be a plea followed by an argued sentencing.

> ***Comment.*** Attorneys should not be discouraged from taking a losing case to trial because one never knows what will happen. If going to trial and losing is no worse than a plea and then proceeding to sentence, take the trial route as long as the client approves. However, an attorney must consider how a trial could affect the individual's sentencing. Sometimes a trial could, in effect, be a long guilty plea that allows the court to see all the facts. However, some facts are better if the court does not see them presented in trial and only hears them from the DA at sentencing. Although judges should not impose a "trial tax" on a client and sentence them harder because they took a case to trial, some judges do just that. An attorney must know that risk and if that is a possibility in the court in which the trial is to be held.

If the first round of negotiation does not get a satisfactory offer, the defense attorney should consider ways to improve the defense BATNA. For example, a report from a private investigator may strengthen the defense case for trial. Showing the exculpatory report to the prosecutor might result in a reduction to the plea offer. However, an attorney should be careful when divulging information to the prosecutor, because each prosecutor will react to information differently. Such a report may cause them to only dig in deeper.

Over the long term, a defense attorney can improve BATNA in almost every case by showing a willingness to take cases to trial or to an argued sentencing. Every county courthouse has attorneys who are considered "afraid to go to trial." These attorneys have little credibility in plea negotiations because their BATNA of going to trial has been exposed as a bluff.

The fourth point of principled negotiation is relying on objective standards. In the criminal defense context, this often means relying on sentences given for similar offenses. For drunk driving, this process has been formalized with sentencing charts in which sentence ranges are determined by referencing the operating while intoxicated (OWI) offense number and the blood alcohol content. For other offenses the likely sentence range probably varies from county to county and judge to judge. In any case, a court's likely sentencing range at an argued sentencing, or a jury's likely verdict at a trial, are objective standards on which both sides can rely in negotiation.

Throughout the negotiation process, the better prepared party has a distinct advantage. Prosecutors have heavy caseloads and can usually devote little time to any one case. By being prepared, the defense attorney can make it easy for the prosecutor to agree to the defense position. Show up on time, which not only shows professionalism but also preserves time to make the client's case to a harried and time-pressed prosecutor. Calculate any sentence credit before meeting with the prosecutor, which can make it easier to get agreement for a time-served sentence. If the client has documents (e.g., letters from treatment providers), bring an extra copy so that the prosecutor has a copy for the file and so that valuable time is not squandered in searching for a photocopy machine. These details may seem trivial, but in a busy courthouse, where time is among the scarcest of resources, preparation is key to success.

Finally, be aware that prosecutors regularly discuss what defense attorneys do, especially if defense attorney conduct is perceived as unethical or unprofessional. No client or case is ever worth risking one's reputation for integrity. A defense attorney's credibility is an important asset, and can sometimes be the decisive factor in reaching an advantageous plea agreement.

G. Bargaining Inducements [§ 6.15]

1. By the Prosecution [§ 6.16]

a. Charge Reduction [§ 6.17]

A reduction in the charge automatically reduces the maximum sentence the judge may impose. Limiting the client's exposure to a jail or prison sentence is often the most important goal in a criminal case.

The defense attorney should be imaginative and not limit the possibilities for charge reductions to the obvious lesser-included offenses. For example, most situations could fit into the catch-all disorderly conduct statute. Often, in the context of a plea bargain, it is possible to negotiate a plea to a crime that does not closely match the conduct that the factual basis establishes. In such cases, the record must establish a factual basis for a more serious charge reasonably related to the offense to which the plea is offered. *State v. Harrell*, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994).

b. "Read-In" [§ 6.18]

The prosecutor may agree to dismiss charges, or not to prosecute uncharged offenses, if the defendant will agree to allow a read-in of these offenses. By agreeing to a read-in, the defendant avoids conviction and sentencing on the read-in offenses. *See State v. Straszkowski*, 2008 WI 65, ¶ 5, 310 Wis. 2d 259, 750 N.W.2d 835. Although the defendant often admits having committed the read-in offenses, such an admission is not required. *See id.* ¶¶ 5–6. The major risks to the defendant are the possibility of receiving a longer sentence for the convicted offense and of liability for restitution to victims of the read-in offenses. *See, e.g.*, *State v. Cleaves*, 181 Wis. 2d 73, 80, 510 N.W.2d 143 (Ct. App. 1993); *see also* Wis. Stat. § 973.20(1g)(b), (1r).

While a read-in bars later prosecution for the read-in offenses or later penalty enhancements, under Wis. Stat. § 939.62, based on such offenses, a dismissed charge (or uncharged crimes stemming from the same event) could be the subject of later prosecution. Therefore, plea bargains should pin down whether a prosecutor is agreeing not to refile dismissed charges. *State v. Frey*, 2012 WI 99, ¶ 88, 343 Wis. 2d 358, 817 N.W.2d 436.

The defendant is entitled to jail credit for confinement on the read-in offenses. *State v. Floyd*, 2000 WI 14, ¶¶ 31–32, 232 Wis. 2d 767, 606 N.W.2d 155. (*Floyd* was abrogated on other grounds by *State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, in which the court held that a read-in offense does not require an admission, as *Floyd* had held). The defendant can earn sentence credit for read-in crimes even if the crimes originated in a different county, especially when the crimes are all part of the same course of conduct (such as a multi-county crime spree). *State v. Fermanich*, 2023 WI 48, 407 Wis. 2d 693, 991 N.W.2d 340 (see Justice Dallet's concurrence, ¶¶ 18–26, for a detailed discussion of "same course of conduct").

c. Charge Dismissal [§ 6.19]

Prosecutors frequently bring excessive charges to lay a false foundation from which to negotiate, offering an illusory bargain. This aspect of negotiations is analogous to a store that starts with a high price on an item and then advertises a substantial discount.

Like a reduction in charges, a dismissal of charges limits the client's exposure *for the dismissed charges only*. Unless it has been previously negotiated, a prosecutor could bring up the dismissed charges at sentencing to argue for a higher sentence within the range of penalties to which the client plead.

d. Promise Not to Bring Additional Charges [§ 6.20]

The district attorney may offer not to bring additional charges in return for a plea (e.g., charges for other crimes or habitual-offender charges). Before the client accepts such a promise, the lawyer must ensure that it is not another form of the illusory bargain by verifying that evidence exists to support the threat to bring more charges. If the prosecutor promises to refrain from bringing other charges (and if the read-in procedure, *see supra* § 6.18, is not used), defense counsel should document the agreement to protect the client in case the prosecutor files such charges later. *See, e.g.*, *State v. Frey*, 2012 WI 99, ¶ 87, 343 Wis. 2d 358, 817 N.W.2d 436.

> ***Comment.*** An interesting question is whether the defense attorney should get the agreement to not bring additional charges on the record. On the plus side, it ensures there is a record of the agreement. On the minus side, the judge now knows the client may have engaged in other nefarious activity. In the opinion of the author, it is the best practice to get it on the record regardless.

e. Sentence Recommendations in General [§ 6.21]

The prosecutor may promise (1) to make specific sentence recommendations, (2) to stand silent or refrain from recommending specific sentences, (3) not to oppose a favorable recommendation, or (4) to abide by the recommendation of a presentence report. Judges often follow the prosecutor's recommendations. Thus, a favorable recommendation by the prosecutor at sentencing may be *the* most important concession the defense attorney can obtain for the client. The nature of the specific case and the sentencing practices of the presiding judge are, however, important factors affecting the likelihood that the judge will follow the prosecutor's recommendation.

f. Place and Nature of Confinement [§ 6.22]

A prosecutor could offer to recommend the following possible places and types of confinement:

1. Work release, which includes release for school, medical treatment, mental health treatment (counseling or therapy), housekeeping (including caring for family members), and community service, Wis. Stat. § 303.08(1);

2. Electronic monitoring, Wis. Stat. § 973.03(4);

3. Concurrent sentences, Wis. Stat. § 973.15(2)(a); and

4. In prison cases, eligibility for programs and procedures that may modify the bifurcated sentence to the client's benefit. *See infra* ch. 8.

> ***Caution.*** Defense counsel should be aware that the prosecutor and the sentencing judge have very limited authority over where and how a defendant is incarcerated and what programs the client receives while incarcerated or on supervision. The county's sheriff has statutory authority over persons in the county's jail, Wis. Stat. § 59.27, and the Department of Corrections has similar authority over persons in prison or on supervision, Wis. Stat. § 301.03.

g. Special Disposition [§ 6.23]

Wis. Stat. § 973.015 provides for possible expungement of a defendant's record upon successful completion of a sentence after conviction for certain offenses. Generally, to qualify for expungement, the defendant must be under the age of 25 when the offense is committed. Wis. Stat. § 973.015(1m)(a)1. For certain offenses committed by someone under the age of 18, expungement is mandatory. *See* Wis. Stat. §§ 938.355(4m)(b), 973.015(1m)(a)2. The decision to grant or deny expungement must be made at the time of sentencing. *See* Wis. Stat. § 973.015. This statute is described more fully in chapter 8, *infra*.

Wis. Stat. § 961.47 allows a conditional discharge for a first offense of possession or attempted possession of certain controlled substances (not available when a defendant is found guilty of possession of marijuana contrary to Wis. Stat. § 961.41(3g)(e). *State v. Boyer*, 198 Wis. 2d 837, 842, 543 N.W.2d 562 (Ct. App. 1995) (construing earlier version of statutes)). This statute is described more fully in chapter 8, *infra*.

Under certain circumstances specified by statute, a criminal charge may be (1) dismissed, subject to the prosecutor's right to proceed in juvenile court; (2) transferred to juvenile court for further proceedings; or (3) adjudicated as a delinquency case with a juvenile-court disposition. See chapter 5, *supra*, for a detailed discussion of the pertinent statutes. Because of the significant potential benefits to the client, and because of the complexity of the pertinent statutes, the defense attorney should consider the possibility of this type of special disposition for any client charged with an offense that allegedly occurred before the client turned 17. Although not all such clients will be eligible for one of these alternatives to adult-court jurisdiction, the attorney should thoroughly research the issue. When negotiating this type of disposition, the attorney may seek any of the following four types of agreements, listed from most to least favorable to the client:

1. An agreement in which the client is not found to have committed any offense that supports adult-court jurisdiction (for example, a 14-year-old is originally charged in adult court with attempted first-degree intentional homicide, but is found to have committed misdemeanor battery; under Wis. Stat. § 938.183(1m)(c)1., the court must adjudge the child delinquent and impose a juvenile disposition);

2. An agreement in which the client is found to have committed an offense that makes the client eligible for a juvenile adjudication and in which the prosecutor agrees to recommend a juvenile adjudication (for example, a 15-year-old is originally charged in adult court with attempted first-degree homicide, but is found to have committed misdemeanor battery; under Wis. Stat. § 938.183(1m)(c)2. and 3., the court must adjudge the child delinquent and impose a juvenile disposition if the defense proves that such a disposition is in the best interests of both the child and the public);

3. An agreement in which the client is found to have committed an offense that makes the client eligible for a juvenile adjudication and in which the prosecutor agrees not to oppose a juvenile adjudication; or

4. An agreement in which the client is found to have committed an offense that makes the client eligible for a juvenile adjudication and in which both sides are free to argue regarding whether a juvenile disposition is appropriate.

Depending on the phase of the proceedings at which the negotiations occur (e.g., before or after a finding of the offense(s) that the child has committed), the negotiations may include an agreement regarding a judicial admission in juvenile court. For example, the defense attorney in a homicide case reached an agreement by which the 13-year-old client would admit (in juvenile court) to the offense of second-degree reckless homicide. As part of the same agreement, the prosecutor agreed to join the defense in recommending transfer from adult court to juvenile court.

To advise clients properly regarding possible juvenile dispositions and to negotiate effectively in this type of case, the defense attorney must be familiar with the dispositional options under the Juvenile Justice Code, Wis. Stat. ch. 938. The general types of available dispositions are described in Katie York et al., *Wisconsin Juvenile Law Handbook* ch. 11 (State Bar of Wis. 5th ed. 2022).

h. Deferred Prosecution or Diversion Programs Under Wis. Stat. §§ 971.37–.39 [§ 6.24]

The defense attorney should determine whether such a program is available in the jurisdiction and find out the criteria for eligibility. Some jurisdictions have informal diversion through the district attorney's office. *See infra* Forms 6.37A–.37E.

i.
"Hold-Open" [§ 6.25]

The defense attorney should consider asking the prosecutor or the court to adjourn the case for a period of time, with the understanding that, if the defendant has no further violations of the law, the case will be dismissed. A *hold-open* may be granted alone or in combination with the defendant's promise to do certain things (e.g., pay restitution, obtain alcohol or drug counseling, graduate from high school, etc.). This option is conceptually similar to a deferred prosecution agreement, *see supra* § 6.24, but with less formality.

j. Deferred Adjudication [§ 6.26]

This option differs from deferred prosecution in that the defendant enters a guilty or no-contest plea, but the court does not formally enter a judgment of guilt. If the defendant complies with the deferred conditions, the prosecutor moves for the agreed-on dismissal or reduction of charge. However, if the defendant fails to comply, the prosecutor may revoke the agreement and proceed to sentencing.

Although no statutory provision authorizes the procedure, circuit courts have inherent authority to accept a deferred-adjudication agreement. *See State v. Wollenberg*, 2004 WI App 20, ¶¶ 6–16, 268 Wis. 2d 810, 674 N.W.2d 916.

k. Community Service [§ 6.27]

Under Wis. Stat. § 973.03(3), a court may sentence a defendant to do community service work in lieu of jail time. More commonly, community service will be agreed to as part of a hold-open agreement or deferred prosecution agreement. Note, however, that monetary contributions to community service organizations *cannot* be the basis for a charge being dismissed or amended. *See* Wis. Stat. § 967.057.

l. "Ordinance Alternative" [§ 6.28]

The defense attorney should investigate whether there is a city or county ordinance to which the charge might be reduced. For example, most if not all counties have a noncriminal ordinance that mirrors the state disorderly conduct statute. This option, known colloquially as a "county DC," is a common means of resolving many low-level disorderly conduct cases.

2. By the Defense [§ 6.29]

a. Restitution [§ 6.30]

The defendant's willingness and ability to pay restitution may be the crucial difference between prison and probation or even, possibly, dismissal of the charge. In cases in which the victim suffered a monetary loss (e.g., theft cases), the defense should explore this avenue vigorously. An ability to pay some or all of the restitution up front may incentivize the prosecutor to work things out. The defense attorney should consider having the victim seek this disposition from the district attorney. *See* Wis. Stat. §§ 950.04(1v)(q), 973.20.

b. Agreement Not to Appeal [§ 6.31]

While an agreement to waive appellate rights is relatively uncommon, in some instances doing so may be a valuable bargaining chip to use in plea or sentencing negotiations, especially if there has been a suppression hearing or a jury trial from which an appeal would otherwise be likely. *See, e.g.*, *State v. Bembenek*, 2006 WI App 198, 296 Wis. 2d 422, 724 N.W.2d 685 (upholding enforceability of appeal waiver agreement).

c. Appeals to Justice, Fairness, and Equity [§ 6.32]

The defense attorney might try to convince the district attorney that the charges against the client are excessive, legally or equitably. The defense attorney might emphasize the consequences the client will suffer unless the sought-after plea agreement is obtained (e.g., first conviction; first misdemeanor; first felony; first county jail; first imprisonment; first adult offense; etc.). Some prosecutors are more receptive to agreements that eliminate or reduce the risk of deportation, loss of the right to possess firearms, revocation of driving privileges, or other collateral consequences of a conviction.

The defense attorney might argue that the client is being treated harshly in comparison with co-defendants or other defendants in the same position. Additionally, the defense attorney might argue that the client was minimally involved in the offense charged (e.g., party to the crime only; went along for the ride; not a principal; led on by older, more sophisticated individuals; fell in with the wrong crowd; in the wrong place at the wrong time; etc.).

d. Other Considerations [§ 6.33]

The defense attorney should remind the prosecutor of the following, as applicable, during negotiations:

1. The crime's nonviolent character;
2. The crime's lack of effect on the victim and the community;
3. The defendant's lack of a prior criminal record;
4. The relationship, if any, between the defendant and the victim;
5. The defendant's youth, advanced age, or poor health;
6. The defendant's work record;
7. Special considerations about the victim (e.g., the victim has a bad character; the victim precipitated the crime; the victim has forgiven the defendant);
8. The defendant's positive changes since the crime occurred, for example having graduated from high school or secured employment;
9. Weaknesses in the state's case or strengths in the defense's case;
10. The hardship to witnesses of testifying; and
11. The unpredictability of trial.

III. Checklist of Factors Affecting the Plea Decision (CRM-0094) [§ 6.34]

☐ The client's wishes (these are the paramount consideration, although the attorney should help the client in weighing the advantages and disadvantages)

☐ The client's admission, or denial, that he or she actually committed the act with which he or she is charged

☐ The best possible result consistent with the client's wishes

☐ The strength of the state's case

☐ The strength of the defense's case

☐ The nature of the offense and its likely impact on a jury

☐ Publicity surrounding the case

☐ Jury attitudes in the county

☐ The judge assigned to the case

☐ The prosecutor's experience, ability, and personality

☐ The likelihood that appellate issues will arise during trial (based on an analysis of the skills of the judge and the prosecutor and the substance of the legal issues that will arise during trial)

☐ The likelihood that details of the crime that could result in a harsher sentence would be revealed at trial

☐ How soon the case would be tried (especially if the client is in jail and unable to post bail)

☐ The likelihood that the client would suffer embarrassment or adverse publicity because of a trial

☐ The psychological stress of a trial on the client

☐ The likelihood that the victim would arouse sympathy in the judge or jury

☐ Whether the client wishes to testify

☐ Whether the client would be a good witness

☐ Whether the client's testimony is necessary for the defense or would be helpful to the case

☐ The client's criminal record, if any

☐ The likelihood that the judge would believe the client's testimony to be intentionally false and consequently impose a harsher sentence

☐ If defense counsel is privately retained, the likely expense of a jury trial

IV. Checklist for Advising the Client on the Plea Decision (CRM-0095) [§ 6.35]

☐ Discuss the case with the client, including the following:

  - The elements of the crime(s) to which the client may plead. *State v. Bangert*, 131 Wis. 2d 246, 267–69, 389 N.W.2d 12 (1986).
  - The law in relation to the facts likely to be proved at trial
  - The strengths and weaknesses of the defense's case

☐ Discuss with the client the pleas that may be entered, Wis. Stat. § 971.06:

  - Not guilty
  - Guilty
  - No contest (as discussed in section 6.12, *supra*, may be preferable to a guilty plea if the possibility of later civil litigation exists)
  - Not guilty by reason of mental disease or defect (may be, and usually should be, joined with a plea of not guilty)

☐ Advise the client that, if he or she stands mute or refuses to plead at the arraignment, the court will enter a plea of not guilty. Wis. Stat. § 971.06(2).

☐ Discuss the alternatives to pleading guilty or no contest with the client, including

  - Trying the case
  - Filing pretrial motions

☐ Explain the right to trial to the client.

☐ Explore any settlement offers with the client.

☐ Advise the client of possible consequences of conviction. It is impossible to list every possible consequence of conviction, especially because some noncriminal collateral consequences of a conviction can change after conviction. Some of the more common consequences of conviction include the following:

  - Jail or prison time and fines. Wis. Stat. §§ 939.50, 939.51, 939.61, 973.05.
    - Costs, fees, and surcharges (see chapter 8, *infra*, for descriptions of commonly imposed surcharges). Wis. Stat. §§ 814.75, 814.76, 973.06.
    - Restitution, including for read-in offenses. Wis. Stat. §§ 973.09(1)(b), 973.20.

  - Community service. Wis. Stat. §§ 973.03(3), 973.05(3), 973.09(7m).
  - The possibility of enhanced sentences for repeat offenders. Wis. Stat. §§ 939.62(1), (2), 351.08, 939.621, 939.63, 939.632, 939.635, 939.645, 961.46, 961.48, 961.49.
  - Mandatory minimum penalties for certain sex crimes, including sexual assault of a child and possession of child pornography. Wis. Stat. §§ 939.62(2m)(a)2m., (b)1., 939.616, 939.617.
  - Mandatory minimum sentence for repeat firearm crimes. Wis. Stat. § 939.6195.
  - Mandatory minimums for drunk driving (mandatory elements of criminal OWI sentence are jail time, fine, revocation of operating privileges, and alcohol assessment, depending on the number of prior suspensions, revocations, and convictions). Wis. Stat. § 346.65.
  - Transfer to an out-of-state prison facility (decision up to the Department of Corrections). Wis. Stat. § 301.21; *State v. Parker*, 2001 WI App 111, 244 Wis. 2d 145, 629 N.W.2d 77.
- Immobilization of vehicle or installation of ignition-interlock device. Wis. Stat. §§ 343.301, 940.09(1d), 940.25(1d).
- Possible eligibility for challenge-incarceration program or earned-release program (if sentenced to prison). Wis. Stat. §§ 302.045, 302.05(3), 973.01(3g), (3m).
- Probation (chapter 8, *infra*, provides an overview of probation). Wis. Stat. § 973.09.
- If the client is already on supervision, the possibility that a new conviction may precipitate revocation proceedings.
- Revocation of probation for refusing to complete probationary sex-offender treatment. *See State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 637, 579 N.W.2d 698 (1998) (holding that probation revocation for defendant who failed to admit guilt during probationary sex-offender treatment was collateral consequence of *Alford* plea; plea was not rendered unknowing and involuntary by circuit court's failure to inform defendant that he would have to admit guilt).
- If convicted of a "sexually violent offense," Wis. Stat. § 980.01(6), possible indefinite commitment under the sexual predator law. Wis. Stat. ch. 980.
- DNA sample. Wis. Stat. § 973.047.
- Sex-offender registration required of certain offenders; public access to information concerning sex offenders. Wis. Stat. §§ 301.45, 301.46.
- Involuntary termination of parental rights based on a conviction for various offenses, such as death or injury to a child resulting in a felony conviction, homicide of or solicitation to commit homicide of a parent, or a serious felony against the child. Wis. Stat. § 48.415(5)(a), (8), (9m).
- Civil disabilities imposed by state law:

  - Loss of, or ineligibility for, certain occupational licenses (the defense attorney should check the applicable Wisconsin Administrative Code sections for the licensing board or contact the appropriate board directly). Wis. Stat. chs. 440–459; SCR 20:8.4, 21.16 (lawyers).
  - Restrictions on sex offenders working with children. Wis. Stat. § 948.13.
  - For felony offenders, loss of the right to vote until the offender is no longer in prison, in jail, on probation, or on extended supervision for a felony. Wis. Stat. §§ 6.03(1)(b), 304.078.
  - Loss of the right to possess a firearm for felony offenders Wis. Stat. §§ 938.341 (delinquency adjudication), 941.29, 968.20(1m), 973.176; 18 U.S.C. § 922(g)(1), (9)
  - Loss of the ability to possess or wear body armor for violent felony offenders. Wis. Stat. § 941.291.
  - Loss of the right to carry a concealed knife that is a dangerous weapon for anyone prohibited under Wis. Stat. § 941.29 from possessing a firearm (e.g., felony offenders). Wis. Stat. § 941.231.
  - Loss of the ability to possess pepper spray (combination of oleoresin of capsicum or CS gel and inert ingredients) for those with a felony conviction (unless they have been pardoned). Wis. Stat. § 941.26(4)(L).
  - Loss of the right to obtain a concealed-carry license for anyone prohibited under Wis. Stat. § 941.29 from possessing a firearm (e.g., felony offenders), Wis. Stat. § 175.60(3)(c), and, as a result, loss of the right to possess an electric weapon or billy club (both require a concealed-carry license, even when carry will be open). Wis. Stat. §§ 175.60(1)(j), 941.295.
  - Revocation, suspension, or restriction of driver’s license or fish and game license. Wis. Stat. ch. 29, Wis. Stat. §§ 343.06, 343.25, 343.325, 938.34(8) (delinquency adjudication), 938.342–.345, 941.29.
  - Requirement for negative controlled-substance test results to participate in federally funded food stamp programs, such as SNAP, for people with felony drug convictions. Wis. Stat. § 49.79(5)(a)
- Liabilities or restrictions under federal statutes or regulations.
  - Possible ineligibility for military service, public office, or employment.
  - If the client is not a citizen, the potential for deportation, exclusion of admission to this country, or denial of naturalization. 8 U.S.C. § 1182; 8 U.S.C. § 1227.
  - Eligibility for student grants, loans, or work assistance (may be affected by conviction for sale or possession of a controlled substance). 20 U.S.C. § 1091(r)(1).

  - Mandatory exclusion from participating in any federal health-care program (such as Medicare and Medicaid) for some types of offenses, for example, a felony conviction for health-care fraud or controlled-substance use. Potential exclusion for some other types of offenses, for example, misdemeanor fraud or theft involving health care. 42 U.S.C. § 1320a-7(a), (b)
  - Federal domestic violence offender gun ban. 18 U.S.C. § 922(g)(9) (applies to convictions for misdemeanor crimes of domestic violence, which, as of October 1, 2022, also include a person who has a current or recent, former dating relationship with the victim. 18 U.S.C. § 921(a)(33)(A)(ii) (amended by Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1332 (June 25, 2022)).
- Privately imposed sanctions or discrimination.
  - Employment discrimination after a conviction for any felony, misdemeanor, or other offense, the circumstances of which "substantially relate" to the job or licensed activity. Wis. Stat. § 111.335(3)(a)1.; *Cree, Inc. v. Labor & Indus. Rev. Comm'n*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837.
  - Higher insurance rates or refusal to insure.
  - Public access to court records; computerized records (*see* Quick Reference Guide to Sentencing, §§ 8.32–.37, *infra*). Wis. Stat. §§ 19.35(1), 758.19(4).
  - Housing discrimination, such as "one-strike" termination of lease from project-based public housing or Section 8 rental-assistance programs because of criminal activity that threatens the health, safety, or right to peaceful enjoyment of premises by other tenants; or any drug-related criminal activity on or off the premises, engaged in by a tenant, any member of the tenant's household, or any guest or other person under the tenant's control (involving any controlled substances listed on schedules I–V, including THC). 42 U.S.C. § 1437d(*l*)(6); *Department of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125 (2002).
- Possible forfeiture or destruction of property connected with the crime to which the client is pleading. Wis. Stat. §§ 342.30(4), 968.20(1m)(b), 973.075–.077.
- Possible civil litigation by the victim (many crimes, such as battery or hit-and-run, are also civil torts).

V. Letter of Agreement [§ 6.36]

Commentary and Instructions for Form 6.36A

Form 6.36A Letter of Agreement (CRM-0096)

When a criminal case is resolved by means of an agreement to plead guilty or no contest, the defense attorney should memorialize the terms of the agreement in writing. Experienced defense attorneys can recount many incidents of forgotten or misunderstood agreements. The risk of a misunderstanding is substantially reduced by documenting the agreement as promptly as possible.

The defense attorney should take the initiative and send an email or letter to the prosecutor describing in detail, and from the defense point of view, the terms of the agreement, including the following:

1. Whether the defendant is to plead guilty or no contest and to what charges (the charges should be set forth by reference to the appropriate statute section and the date of the offense);

2. Whether other charges are to be dismissed or read in (such charges should also be set forth by reference to statute number and the date of the offense);

3. Whether any charges from other counties are to be consolidated and, if so, whether there is to be a plea to these charges or whether they will be read in; and

4. Whether the prosecutor has agreed to a sentence recommendation.

Caveat. Sometimes an agreement is reached just before a court hearing. It may be beneficial to present the plea agreement to the court immediately, rather than delay entry of the plea solely to permit the defense attorney to prepare a written summary of the agreement.

Form 6.36A, *infra*, is a sample letter memorializing a plea agreement.

Distribution

Original:	District attorney
Copy:	Client; client file

Notes

Form 6.36A Letter of Agreement (CRM-0096)

(Date)

To: *(4.01) (Prosecutor's Name)*
District Attorney for *(1.01)* *County*
(4.02) (Prosecutor's Address)

Re: *(3.01) (Client's Name)*
Case No. *(1.02)*

Dear *(4.01) (Prosecutor's Name):*

The purpose of this letter is to memorialize the terms of our agreement to settle this case. In our discussions concerning this case on __________, you agreed, on behalf of the District Attorney's Office for *(1.01)* County, to the following resolution of this matter:

(Set forth in as much detail as possible the terms
of any plea agreement. Be sure to include read-ins,
dismissals, sentencing recommendations, etc.)

I trust that this letter fully sets forth all the terms of our agreement. If I do not hear from you to the contrary by __________, I will assume that I have correctly stated our agreement in full.

Sincerely,

/s/
(2.01) (Attorney Handling Case)
(2.07) (Attorney's Email Address)
State Bar No. *(2.02)*

VI. Deferred Prosecution and Deferred Judgment Agreements [§ 6.37]

Commentary and Instructions for Forms 6.37A–6.37E

Form 6.37A	Deferred Prosecution Agreement (Version 1) (CRM-0097)
Form 6.37B	Order for Deferred Prosecution (CRM-0098)
Form 6.37C	Deferred Prosecution Agreement (Version 2) (CRM-0099)
Form 6.37D	Deferred Judgment Agreement (CRM-0100)
Form 6.37E	Order for Deferred Judgment (CRM-0101)

Wis. Stat. §§ 971.37, 971.38, and 971.39 allow for deferred prosecution in Wisconsin. A deferred prosecution agreement is a contract entered into by the defendant, the defense attorney, and the prosecutor. Under the terms of the agreement, the defendant agrees to certain conditions in return for the prosecutor's promise to dismiss pending charges or not to prosecute potential charges. A criminal case need not be pending at the time of the agreement.

> ***Note.*** In many counties, the district attorney's office or the court will have standard forms for deferred prosecution or deferred judgment. Before using any of the forms in this book, defense counsel should verify if the county has a standard form.

The first deferred prosecution agreement, Form 6.37A, *infra*, assumes that criminal proceedings have already been instituted and that the prosecution and defense have agreed to suspend the proceedings. In these circumstances, the presiding judge must concur in the agreement. *See infra* Form 6.37B (Order for Deferred Prosecution); *see also State v. Kenyon*, 85 Wis. 2d 36, 270 N.W.2d 160 (1978); *State ex rel. White v. Gray*, 57 Wis. 2d 17, 203 N.W.2d 638 (1973); *State v. Lloyd*, 104 Wis. 2d 49, 310 N.W.2d 617 (Ct. App. 1981). The second deferred prosecution agreement, Form 6.37C, *infra*, assumes that no formal proceedings have been instituted and that the parties have decided to enter into such an agreement in lieu of charges being issued.

Although the statutes are not crystal clear on this point, deferred prosecution agreements appear to be available as a settlement device in most criminal cases in Wisconsin. *See* Wis. Stat. § 971.37(5). Specifically excepted from deferred prosecution agreements in Wisconsin are OWI offenses. *See* Wis. Stat. § 967.055(3).

Deferred prosecution agreements must be in writing and signed. Any admissions or statements made in connection with such an agreement are not admissible as evidence if the agreement fails. Wis. Stat. §§ 971.37(4), 971.39(2). A deferred prosecution agreement may include the following:

1. A statement waiving the accused's right to a speedy trial, Wis. Stat. §§ 971.10, 971.37(1m)(b);

2. A statement that the agreement tolls any applicable civil or criminal statute of limitation during the period of the agreement, Wis. Stat. § 971.37(1m)(b);

3. A requirement that the accused report to the district attorney, probation officer, or deferred prosecution worker at specified intervals, Wis. Stat. §§ 971.37(1m)(b), 971.39(1);

4. If the alleged offense involves a form of domestic or sexual abuse under Wis. Stat. § 940.225, 948.02, 948.025, 948.05, 948.06, 948.085, or 948.095, an agreement to pay the domestic abuse surcharge under Wis. Stat. § 973.055, Wis. Stat. § 971.37(1m)(c);

Note. The district attorney has considerable discretion in this area and can agree to less than a full assessment.

5. The length of time the agreement is in effect;

6. The accused's admission, in writing, of all the elements of the offense, Wis. Stat. § 971.39(1)(b) (required only when the Department of Corrections is a party to the agreement, *see* Wis. Stat. § 971.39(1); otherwise, the defense attorney should try to avoid including this in the agreement);

7. Agreements by the accused to participate in therapy or counseling programs (e.g., for alcohol or drug abuse or for marital, psychiatric, psychological, or financial problems) and to abide by any conditions imposed by those programs, Wis. Stat. § 971.39(1)(c);

8. An agreement by the accused to participate in a community service program and the length of the program, Wis. Stat. § 971.38;

9. An agreement by the accused to pay restitution in a specified amount;

10. An agreement by the accused to refrain from contacting or harassing the alleged victim or the alleged victim's family;

11. An agreement by the accused to search for work;

12. A statement that failure to comply with all the terms of the agreement may result in an institution, or reinstitution, of the proceedings against the accused, *see* Wis. Stat. § 971.37(1m)(c); *see also* Wis. Stat. § 971.39(1)(d); and

13. The signatures of the parties, including the prosecutor, the accused, and, when applicable under Wis. Stat. § 971.39(1)(a), a representative of the Department of Corrections (Division of Community Corrections).

Note. The signatures of the defense attorney and the judge (if one is involved) are not required by statute but should be included.

Deferred judgment agreements do not have any official statutory sanction. Nevertheless, circuit courts have inherent and discretionary authority to approve these agreements. *See State v. Daley*, 2006 WI App 81, ¶¶ 8–13, 292 Wis. 2d 517, 716 N.W.2d 146; *State v. Wollenberg*, 2004 WI App 20, ¶ 16, 268 Wis. 2d 810, 674 N.W.2d 916; *see also State v. Terrill*, 2001 WI App 70, ¶¶ 11, 19, 242 Wis. 2d 415, 625 N.W.2d 353 (holding that court was bound by terms of deferred judgment agreement after it had accepted the agreement). There is no explicit prohibition against suspending the court proceedings after entry of a plea and before entry of judgment. Forms 6.37D and 6.37E, *infra*, are essentially the same as Forms 6.37A and 6.37B, *infra*, but are modified to reflect the deferred judgment situation.

Many prosecutors and judges favor deferred judgment agreements because such agreements provide more leverage over a defendant. If the defendant fails to fulfill the agreement's terms, all that is needed is a motion to vacate or set aside the agreement and then to proceed to judgment and sentencing. Under such circumstances, a full due process hearing on whether the agreement should be vacated or set aside would seem appropriate. *See generally Wisconsin Juvenile Law Handbook*, *supra* § 6.23, ch. 6.

Many counties have specific criteria for deferred judgment agreements (or similar procedures leading to dismissal or reduction of charges) through treatment courts, also known as problem-solving courts or specialty courts. Examples include drug courts, OWI courts, and veterans' courts.

A treatment court is generally a program in which defendants agree to undertake rigorous courses of treatment to address drug dependency, alcohol abuse, or other issues related to criminal conduct. Defendants return to court frequently (often weekly or biweekly) for appearances at which their caseworkers inform the judge of their progress. Although these programs entail strict oversight of participants, they rely on a system of graduated sanctions rather than automatically terminating participation in response to a violation. Thus, although some defendants are discharged for noncompliance or because of new criminal charges, these programs often have high success rates.

Defense attorneys should familiarize themselves with the treatment court programs and similar services available in the counties where they practice. The local office of the State Public Defender is a good source of current information about these programs. Information is also available through the Wisconsin Court System website at *Problem-Solving Courts*, https://www.wicourts.gov/courts/programs/problemsolving/index.htm (last updated Feb. 13, 2022).

Distribution

Original:	E-file with the court (if proceeding instituted)
Copy:	District attorney; Division of Community Corrections; client; client file (in addition, in domestic or sexual abuse cases, the alleged victim or the alleged victim's parent or guardian)

Notes

Form 6.37A Deferred Prosecution Agreement (Version 1) (CRM-0097)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Defendant

Case No. *(1.02)*

DEFERRED PROSECUTION AGREEMENT

Pursuant to Wis. Stat. §§ 971.37, 971.38, and 971.39, the undersigned parties agree to defer further proceedings in this case, subject to the following:

1. Any proceedings against the defendant are suspended immediately for a period of *(insert number)* months.

2. During the period of this agreement, the defendant waives the right to a speedy trial under Wis. Stat. § 971.10.

3. During the period of this agreement, the defendant agrees to a tolling of any applicable civil and criminal statutes of limitation.

4. [*Note: Required only if Department of Corrections is a party; otherwise, not recommended.*] In this case, the defendant is accused of *(7.01) (Charges)* in violation of Wis. Stat. §(§) *(7.02) (Statute No(s).)*. For the purposes of this agreement alone and for no other purpose, the defendant does *(admit/not contest)* those allegations, the elements of which are the following:

(List the elements of the alleged offense(s).)

In addition, for the period of this agreement the defendant will comply with the following conditions: *(Insert the agreed-on conditions. Some examples are set forth below.)*

1. The defendant will report to the *(e.g., district attorney, probation officer, deferred prosecution worker)* on a *(e.g., daily, weekly, monthly)* basis.

2. The defendant agrees to pay a domestic abuse surcharge in the amount of *(specify amount)*. *[Note: Include the terms of any payment plan.]*

3. The defendant agrees to participate in, and abide by any conditions imposed by, *(insert generic or specific counseling programs, e.g., alcohol or drug abuse, marital, psychiatric or psychological, budget or financial)*.

4. The defendant agrees to complete *(specify number)* hours of community service. *(If appropriate, include generic or specific community service programs.)*

5. The defendant agrees to pay restitution to the alleged victim in the amount of *(specify amount)*. *[Note: Include the terms of any payment plan.]*

6. The defendant agrees to refrain from contacting or harassing *(name(s))*.

7. The defendant agrees to *(e.g., search for work, attend school, etc.)*.

The parties understand and agree that the defendant's failure to comply with all the terms of this agreement can result in a reinstitution of the proceedings against the defendant pursuant to Wis. Stat. §§ 971.37(2) and 971.39(1)(e). The parties further understand and agree to the following provisions:

1. If the defendant complies with all the above conditions, the charges pending against the defendant in this case will be dismissed with prejudice at the end of the period specified above.

2. Neither this agreement nor any admission entered into under this agreement, nor any inferences arising from this agreement, may be admitted as evidence in any trial, civil or criminal.

3. This agreement is subject to the defendant's right to preserve or raise objections to the court's jurisdiction if the proceedings against the defendant are reinstituted for any reason.

4. During the suspension of proceedings contemplated by this agreement, the state waives its right to raise any objection to the timeliness of any motions, objections, or substitutions that have not already been waived or raised.

5. All parties to this agreement will receive a copy of this agreement. In addition, the following persons will be given copies:

(List all persons to receive copies, including mailing addresses when appropriate. Likely recipients include the alleged victim, any attorneys, etc.)

The undersigned parties have read and acknowledge receipt of a copy of this agreement and further agree to abide by its terms. The parties move the court to accept this agreement.

Dated: ________________________________

/s/ ________________________________
(3.01) (Client's Name)

/s/

(2.01) (Attorney Handling Case)
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. (2.02)

/s/

(4.01) (Prosecutor's Name)

State Bar No. *(2.02)*

/s/

(Representative of Division
of Community Corrections)

Form 6.37B Order for Deferred Prosecution (CRM-0098)

STATE OF WISCONSIN	CIRCUIT COURT	*(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. (1.02)

(1.03) ____________________

Defendant

ORDER FOR DEFERRED PROSECUTION

It appearing to the court that this action has been fully resolved, settled, adjusted, and compromised, and based on the stipulated deferred prosecution agreement, therefore,

IT IS ORDERED AND ADJUDGED:

1. The terms and conditions of the stipulated deferred prosecution agreement are approved.

2. Any agency or person providing services under this agreement is requested to furnish a written report to the court and the parties certifying the defendant's successful completion of the program.

3. Unless the district attorney's office makes further application to this court indicating the defendant's violation of the agreement, this case shall be dismissed, with prejudice, *(specify number)* months from the date of this order.

Form 6.37C Deferred Prosecution Agreement (Version 2) (CRM-0099)

(Date)

To: *(4.01) (Prosecutor's Name)*
District Attorney for (1.01) County
(4.02) (Prosecutor's Address)

Re: *(3.01) (Client's Name)*
Deferred Prosecution Agreement

Dear *(4.01) (Prosecutor's Name)*:

The purpose of this letter is to memorialize our understanding to enter into a deferred prosecution agreement. This agreement covers allegations that my client *(summarize the allegations, including dates if possible)*.

The parties to this agreement are the District Attorney of *(1.01)* County by *(4.01) (Prosecutor's Name)* acting as *(his/her)* designee, *(3.01) (Client's Name)*, and *(2.01) (Attorney Handling Case)*. This agreement is entered into pursuant to Wis. Stat. §§ 971.37, 971.38, and 971.39. The parties agree as follows:

1. The district attorney's office promises not to institute any criminal charges against *(3.01) (Client's Name)* for a period of *(insert number)* months.

2. During the period of this agreement, *(3.01) (Client's Name)* waives the right to a speedy trial under Wis. Stat. § 971.10.

3. During the period of this agreement, *(3.01) (Client's Name)* agrees to a tolling of any applicable civil and criminal statutes of limitation.

4. [*Note: Required only if Department of Corrections is a party; otherwise, not recommended.*] For the purposes of this agreement alone and for no other purpose, *(3.01) (Client's Name)* does *(admit/not contest)* the allegations against *(him/her)*, the elements of which are:

(List the elements of the alleged offense(s).)

In addition, for the period of this agreement *(3.01) (Client's Name)* will comply with the following conditions: *(Insert the agreed-on conditions. Some examples are set forth below.)*

1. *(He/She)* will report to the *(e.g., district attorney, probation officer, deferred prosecution worker)* on a *(e.g., daily, weekly, monthly)* basis.

2. *(He/She)* agrees to pay a domestic abuse assessment in the amount of *(specify amount)*. *[Note: Include the terms of any payment plan.]*

3. *(He/She)* agrees to participate in and abide by any conditions imposed by *(insert generic or specific counseling programs, e.g., alcohol or drug abuse, marital, psychiatric or psychological, budget or financial)*.

4. *(He/She)* agrees to complete *(specify number)* hours of community service. *(If appropriate, include generic or specific community service programs.)*

5. *(He/She)* agrees to pay restitution to the alleged victim in the amount of *(specify amount)* . *[Note: Include the terms of any payment plan.]*

6. *(He/She)* agrees to refrain from contacting or harassing *(name(s))*.

7. *(He/She)* agrees to *(e.g., search for work, attend school, etc.)*.

The parties understand and agree that the failure of *(3.01) (Client's Name)* to comply with all the terms of the agreement can result in an institution of proceedings against *(him/her)* pursuant to Wis. Stat. §§ 971.37(2) and 971.39(1)(e). The parties further understand and agree as follows:

1. If *(3.01) (Client's Name)* complies with all the above conditions, the allegations pending against *(him/her)* will not result in any prosecution of *(him/her)* for any incidents arising out of the facts set forth in the first paragraph of this agreement.

2. Neither this agreement nor any admission entered into under this agreement nor any inferences arising from this agreement may be admitted as evidence in any trial, civil or criminal.

3. This agreement is subject to the right of *(3.01) (Client's Name)* to preserve or raise objections to the court's jurisdiction if proceedings against *(him/her)* are instituted for any reason.

4. All parties to this agreement will receive a copy of this agreement. In addition, the following persons will be given copies:

(List all persons to receive copies, including mailing addresses when appropriate. Likely recipients include the alleged victim, any attorneys, etc.)

I trust that this letter fully sets forth all the terms of our agreement. If it does, please read and sign the acknowledgment below and return the original and one copy to me as soon as possible. I have included a duplicate original signed by myself and my client for your files.

Sincerely,

/s/
(2.01) (Attorney Handling Case)
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. (2.02)

I have read the above agreement and thoroughly understand it and agree to abide by its terms.

/s/ Date: ____________________
(3.01) (Client's Name)

I have read the above agreement and thoroughly understand it and agree to abide by its terms.

/s/ Date: ____________________
(4.01) (Prosecutor's Name)

Form 6.37D Deferred Judgment Agreement (CRM-0100)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. (1.02)

(1.03) ____________________

Defendant

DEFERRED JUDGMENT AGREEMENT

Pursuant to Wis. Stat. §§ 971.37, 971.38 and 971.39, the undersigned parties agree as follows:

1. Any proceedings against the defendant are suspended immediately for a period of *(insert number)* months.

2. During the period of this agreement, the defendant waives the right to a speedy trial under Wis. Stat. § 971.10.

3. During the period of this agreement, the defendant agrees to a tolling of any applicable civil and criminal statutes of limitation.

4. In this case, the defendant is accused of *(7.01) (Charges)* in violation of Wis. Stat. §(§) *(7.02) (Statute No(s).)*. This is a DEFERRED JUDGMENT AGREEMENT. The defendant agrees to enter a plea of other than not guilty to the charge*(s)* or amended charge*(s)*, but understands that the court will not enter judgment unless the defendant fails to fulfill the terms of this agreement. Under the agreement entered into with the district attorney, the defendant will enter a plea of *(guilty/no contest)*

to the charge*(s)* of *(name of offense(s))* in violation of Wis. Stat. §(§) *(cite applicable statute number(s))*, the elements of which are the following: *(List the elements of the agreed-on offense(s).)*

5. The defendant has completed and signed the *(Guilty Plea Questionnaire and Waiver of Rights form and)* CR-233 Notice of Right to Seek Postconviction Relief, and *(that/those)* document*(s)* will be filed with this agreement.

In addition, for the period of this agreement the defendant will comply with the following conditions: *(Insert the agreed-on conditions. Some examples are set forth below.)*

1. The defendant will report to the *(e.g., district attorney, probation officer, deferred prosecution worker)* on a *(e.g., daily, weekly, monthly)* basis.

2. The defendant agrees to pay a domestic abuse surcharge in the amount of *(specify amount)*. *[Note: Include the terms of any payment plan.]*

3. The defendant agrees to participate in and abide by any conditions imposed by *(insert generic or specific counseling programs, e.g., alcohol or drug abuse, marital, psychiatric or psychological, budget or financial)*.

4. The defendant agrees to complete *(specify number)* hours of community service. *(If appropriate, include generic or specific community service programs.)*

5. The defendant agrees to pay restitution to the alleged victim in the amount of *(specify amount)*. *[Note: Include the terms of any payment plan.]*

6. The defendant agrees to refrain from contacting or harassing *(name(s))*.

7. The defendant agrees to *(e.g., search for work, attend school, etc.)*.

The parties understand and agree that the defendant's failure to comply with all the terms of the agreement can result in a reinstitution of the proceedings against the defendant pursuant to Wis. Stat. §§ 971.37(2) and 971.39(1)(e). The parties further understand and agree as follows:

1. If the defendant complies with all the above conditions, the plea entered by the defendant will be vacated and this case will be dismissed with prejudice at the end of the period specified above.

2. This agreement, any admission entered into under this agreement, and any inferences arising from this agreement will not be admitted as evidence in any trial, civil or criminal.

3. During the suspension of proceedings contemplated by this agreement, the state waives its right to raise any objection to the timeliness of any motions, objections, or substitutions that have not already been waived or raised.

4. All parties to this agreement will receive a copy of this agreement. In addition, the following persons will be given copies:

(List all persons to receive copies, including mailing addresses when appropriate. Likely recipients include the alleged victim, any attorneys, etc.)

5. If the district attorney's office believes that the defendant has violated the terms of this agreement, it will file a motion to vacate or set aside this agreement and for imposition of judgment. On any such motion, the defendant is entitled to notice and a full due process hearing. The defendant is not, however, entitled to a jury trial on the issue of whether this agreement should be set aside.

The undersigned parties have read and acknowledge receipt of a copy of this agreement and further agree to abide by its terms. The parties move the court to accept this agreement.

Dated: ______________________________

/s/
(3.01) (Client's Name)

/s/
(2.01) (Attorney Handling Case)
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. (2.02)

/s/
(4.01) (Prosecutor's Name)

State Bar No. *(2.02)*

/s/
(Representative of Division
of Community Corrections)

Form 6.37E Order for Deferred Judgment (CRM-0101)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. *(1.02)*

(1.03) ____________________

Defendant

ORDER FOR DEFERRED JUDGMENT

It appearing to the court that this action has been fully resolved, settled, adjusted, and compromised, and based on the stipulated deferred judgment agreement; therefore,

IT IS ORDERED AND ADJUDGED:

1. The terms and conditions of the stipulated deferred judgment agreement are approved.

2. Any agency or person providing services under this agreement is requested to furnish a written report to the court and the parties certifying the defendant's successful completion of the program.

3. Unless the district attorney's office makes further application to this court indicating the defendant's violation of the agreement, the plea entered by the defendant shall be vacated and this case shall be dismissed, with prejudice, *(specify number)* months from the date of this order.

VII. Consolidations [§ 6.38]

Commentary and Instructions for Forms 6.38A–6.38B

Form 6.38A	Application for Consolidation (CRM-0102)
Form 6.38B	Consent to Consolidation (CRM-0103)

Wis. Stat. § 971.09 allows for the consolidation in one county of crimes committed in other counties in Wisconsin. The statute specifically discusses pleas of guilty. This statute, however, has long been used for pleas of no contest and read-ins.

Under the statute, any person who admits to having committed crimes in a county other than the county in which he or she is in custody may apply to the district attorney of the county of custody to be charged with those other crimes "so that the person may plead guilty and be sentenced for them in the county of custody." Wis. Stat. § 971.09(1). The following documents are required:

1. An application describing all the admitted crimes and listing the county in which each was committed, *id.*; *see infra* Form 6.38A;

2. An information prepared by the district attorney of the county in which the parties contemplate that the disposition will take place, to be forwarded with the application to the district attorney(s) of the county or counties where the person admits to having committed crimes, Wis. Stat. § 971.09(2); and

3. A written consent executed by the district attorney for each of the other counties, allowing the person to enter a plea to the crimes charged in the information in the county of custody, *id.*; *see infra* Form 6.38B.

The district attorney of the county of custody must file the information and consent(s) with any court of his or her county having jurisdiction over the most serious offense alleged. Wis. Stat. § 971.09(3). That court then has jurisdiction over all the crimes alleged in the information and supported by a consent. The defendant may then enter pleas and be sentenced by that court. If charges were pending in the other county or counties, the district attorney(s) of the other county or counties must move to dismiss any charges covered by the plea.

Before agreeing to a consolidation, the district attorneys of all the counties must understand fully any plea agreements entered into relating to the crimes committed in their counties.

Distribution

Original:	E-file
Copy:	District attorney for each county involved; client; client file

Notes

Form 6.38A Order for Deferred Judgment (CRM-0101)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S APPLICATION FOR CONSOLIDATION

Pursuant to Wis. Stat. § 971.09, the defendant, by the undersigned attorney, applies to the district attorney of this county for the consolidation of the following crime*(s)* committed in *(another county/other counties)* of this state:

> *(List in separately numbered paragraphs the crime or crimes committed in other counties. Each paragraph should contain a description of the crime(s) committed in the other county. To prevent future jeopardy, the description should contain as much detail as possible. Reference should be made to criminal statute numbers and any circuit court file numbers.)*

This application is made pursuant to a proposed settlement of *(all)* the above charge*(s)*. This proposed settlement has been previously discussed and agreed to by the defendant, *(his/her)* attorney, the district attorney of this county, and the district attorney's office of *(each of)* the *(county/counties)* listed above. The terms and conditions of the proposed settlement are as follows:

> *(Set forth the details of any proposed settlement. Be sure to specify: (1) the nature of any plea, whether guilty or no contest; (2) whether crimes are to be read in or dismissed outright; and (3) any sentencing recommendations.)*

This application is made in the interest of the efficient administration of justice and on the defendant's behalf.

Dated: ___________________________________

Sincerely,

(2.03) (Firm/Office Name)

Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]____________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 6.38B Consent to Consolidation (CRM-0103)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

PLAINTIFF'S CONSENT TO CONSOLIDATION

I, *(District Attorney's Name)*, District Attorney for *(insert name of county where other crime(s) committed)* County, Wisconsin, consent to a consolidation in *(insert name of county where plea will take place)* of the crime(s) committed within the borders of *(insert name of county where other crime(s) committed)* County and listed in the attached application for consolidation.

I agree that, following a disposition of the alleged crimes, I will move to dismiss any charges covered by this consolidation that are currently pending in this county.

I further agree that, if the charges covered by this consolidation are not currently pending in any court in this county, they will not be brought against the defendant.

Dated: ______________________________

[Type "Electronically signed by"
and district attorney's name on this line]
District Attorney for __________ County
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(District Attorney's Email Address)
State Bar No. *(2.02)*

Chapter 7

Preparing for Trial

I. Introduction [§ 7.1]

The defense attorney should approach every case, even in the earliest stages, as though a jury trial is a certainty. *See* SCR 20:1.1; *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985); *State v. Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973); *supra* ch. 3.[1]

There are several reasons for this:

1. Physical, documentary, and electronic evidence may be available at the outset of the case but become unavailable over the pendency of the case. The following are a few examples: 911 and police-radio traffic recordings are not typically provided in discovery and are deleted in accordance with local schedules; voicemails, text messages, answering machine recordings, and security footage disappear through inadvertent erasure or scheduled deletion; a witness may have relevant documentation that is discarded. Defense attorneys should request body-worn camera and dash camera footage as soon as possible.

2. Witness recollections deteriorate rapidly, resulting in important details being lost over time.

3. Information collected early in a case will permit both defense counsel and client to meaningfully assess settlement offers made during the pendency of the case.

4. Many of an attorney's best thoughts about the case will come at random moments, both in and out of the office. If a file is set up in anticipation of a trial, there will be appropriate locations in which to record these ideas, for example in a document set up to hold rough notes for an opening statement. Prompt investigation and preparation of the case will help inform these thoughts.

5. During the investigative phase of the case the many parts of the eventual trial notebook will be scattered throughout the file, but the process of preparing the notebook will have already begun.

Since this manual was first published in 1981, computer use has been incorporated into virtually all aspects of the legal profession, including criminal defense work, and makes preparing cases for trial easier than ever before. The system suggested in this chapter works equally well for computerized and old-fashioned paper files. Whether high-tech or low-tech, automated or manual, effective trial preparation requires an organization system.

Jury Instructions First, Not Last

The court instructs the jury on the law; the jurors, in turn, apply the law to the facts as they find them. But "the law" is not provided to the jurors as statutory language; it is provided to them in the form of instructions, usually from *Wisconsin Jury Instructions—Criminal*. Because the jury will only know the law through instructions read and provided by the court, in a very real sense the jury instructions are the law. *At the earliest possible point in the representation*, place in the trial notebook the instructions relevant to the case and refer to them frequently for help in analyzing evidentiary and trial strategy questions. Begin to analyze whether there are gaps in the jury instructions, the instructions are inadequate to support a planned theory of defense, or other novel instructions should be requested. *See infra* § 7.13. Allow the jury instructions to inform your preparation and investigation of the case.

Eleventh Hour Negotiations

Defense attorneys should explain to their clients that, because settlement negotiations might continue through the close of business on the Friday before the trial is set to begin, the client should be available by phone to discuss new settlement offers. The time-consuming process of fielding a new offer, reaching the client, discussing it with the client, and getting back in touch with the prosecutor will seriously interfere with trial preparation, because it will result in a loss of momentum as well as time. These effects can be minimized by thoroughly explaining to the client well in advance of trial all the pitfalls of last-minute offers. Obtaining settlement authority (the client's "bottom line") a week before trial can help to minimize the disruptive effects of last-minute offers. *But this is only because it will streamline discussions with the client; a client grant of settlement authority does not obviate the obligation to immediately present all new settlement offers to the client.*

Be prepared for the possibility that settlement negotiations will resume again on Monday morning, and prepare the client for that possibility. It is not unusual that a case settles just before or after jury selection. Mid-trial settlements, not at all unusual in civil cases, are rare in criminal cases, but can occur. Once the case is underway, there will be very limited time to discuss settlement offers with the client; once again, advance discussion of the possibility of last-minute offers will make the available time more productive.

Risk of Adjournment

The defense attorney might be fully prepared, with witnesses under subpoena, only to have the case bumped by a higher priority case, such as a case in which a speedy trial demand has been filed. Even when delay is a conscious defense strategy, adjournments can be stressful, even exhausting, for both client and attorney. However, though defense counsel and the client will understand the reasons for the adjournment, the witnesses, who have scheduled time off from work and perhaps travelled some distance to attend trial, might be far less understanding. This can cause witnesses to lose enthusiasm, and next time around it should be anticipated that witnesses will react with frustration and skepticism.

Although doing so might not always be possible, attempt to place witnesses in "on call" status if they are willing to cooperate by being ready to appear in court on short notice, perhaps 45 minutes to an hour. The lawyer should get the approval of the judge assigned to the case for this practice of placing a witness on call. It is always beneficial to wait to schedule any testifying experts until it is certain, or as certain as possible, that the case will proceed to trial. Otherwise, the inconvenience to the expert witness can become the defense's trial cost.

> ***Practice Tip.*** The chance that the case will proceed to trial on the scheduled date can be increased in several ways. First, defense counsel can file a speedy trial demand at a time when the already–scheduled date falls within the requirements of the speedy trial statute. *See* Wis. Stat. § 971.10. Send the demand with a cover letter stating that the filing will require no action by the court because the already scheduled date satisfies the requirements of the speedy trial statute, explaining that the demand is being filed to ensure that the trial proceeds on that date. While the filing of the demand by no means guarantees the trial will proceed, it could very well improve the chances.
>
> Another way to increase the chance that the case will proceed to trial is by requesting a trial date when it can be assured the number one position. This usually means a later trial date, and judges are reluctant to promise a number one position because, during the intervening months, the court has less scheduling flexibility. Courts are more likely to promise a number one position in cases requiring several days of trial and cases with serious witness availability problems, such as a case in which a witness must travel long distances or a case in which a necessary expert witness has a very crowded schedule. If the prosecutor has such witnesses, suggest to the prosecutor a joint request for a number one position. Again, a number one position will not guarantee that the case will proceed on that date, but, if the case is bumped, the court might inform the parties of the delay days or weeks in advance of trial rather than on the morning of jury selection.

II. The Trial Notebook [§ 7.2]

A. In General [§ 7.3]

The trial lawyer stands hip-deep in a fast-moving stream of information: broadcast and online media reports, social media packed with links back to those reports, brief exchanges with friends and colleagues, and listserv posts in the lawyer's areas of practice. Over the course of a week, this fast-moving stream will carry several bits of very useful information pertaining to the lawyer's pending cases. This might include any of the following:

1. A media report of an arrest, trial, or sentencing on an identical charge. The defense counsel in that case is a colleague who will almost certainly help with issue spotting and briefs on shared issues. In the unlikely event that attorney will not, visit Wisconsin Circuit Court Access (CCAP) at https://wcca.wicourts.gov/ (last visited Oct. 31, 2022) and look for filings that might warrant a

trip to the courthouse to read the file. Most Wisconsin courts store files electronically and exclusively via the eFiling system. A lawyer who sends an email or letter to the local clerk might be more likely to receive the documents that the lawyer requests.

2. An electronic list post

   c. about the prosecutor or the judge assigned to the case;
   d. with a case citation or brief on an issue likely to arise in the case;
   e. noting a new appellate decision on an issue likely to arise in the case;
   f. discussing expert witnesses on an issue likely to arise in the case;
   g. discussing investigators available locally; or
   h. including a turn of phrase that might be useful in an opening statement.

> ***Practice Tip.*** Useful electronic resources include the State Bar of Wisconsin's Criminal Law Section blog and electronic list; the Wisconsin Association of Criminal Defense Lawyers (WACDL) electronic list; and On Point, a blog curated by the Wisconsin State Public Defender Appellate Division, https://www.wisconsinappeals.net/.

3. A media report concerning misconduct by an officer involved in the case; or

4. A media report canvassing public reaction to an arrest under circumstances similar to those in the case.

Upon being retained, open a file with subheadings to store such information. The headings might include the following:

1. Voir Dire
2. Opening/Closing
3. Lay Witnesses

   a. Officer Smith
   b. Officer Jones
   c. Client
   d. Client's friend Rob Roy

4. Expert Witnesses

   a. Lab Analyst Doe
   b. Possible Defense Experts

5. Pleadings

   a. Discovery Demands
   b. Motions
   c. Motions in Limine
   d. Trial Brief

6. Jury Instructions
7. Sentencing

Without effort or even intention, the factual and legal particulars of the client's case will influence the items observed in the stream of information. With just a little practice, some of these items can be readily identified and easily saved as valuable tidbits of information.

B. The Form of the File at Trial [§ 7.4]

In theory, a case can be tried without a paper file. Laptop or tablet documents or files could contain an outline of pretrial issues, voir dire, an opening statement, witness examination outlines, a closing argument, and real-time trial notes. Exhibits in electronic format on the laptop could be displayed on available courtroom equipment. This approach, however, is fraught with peril. Even the most enthusiastic advocates of courtroom technology caution against total reliance on electronic format. The court, the jury, and the prosecution will not wait patiently through attempts to recover documents or display recalcitrant exhibits. Always be prepared to segue seamlessly into exclusive use of hard documents. Have a paper folder for each witness containing notes for the examination and multiple copies of documents to refer to during the examination.

C. Trial Outline [§ 7.5]

This section contains trial checklists and a trial outline.

The Checklist of Things to Do at the Opening of Trial (*infra* Form 7.19A) lists matters that, depending on the posture of the case, might be raised at the beginning of trial, such as the renewal of jurisdictional objections and discovery demands. The checklist is designed so the attorney can add items as needed. For example, if motions in limine or motions to suppress have not yet been addressed, they should be added to the list. The Checklist of Things to Do During Trial (*infra* Form 7.19B) gives the defense attorney a place to record matters that come up in the heat of trial and that will require action before the trial ends. For example, counsel might list a motion for a mistrial to be made or renewed, a sidebar conference to be summarized, an argument or objection to evidence that the judge has held in abeyance until the next recess, or evidence received conditionally under Wis. Stat. § 901.04(2).

Before trying the case, attend as many trials or portions of trials as possible; obviously proceedings before the assigned trial judge will be particularly helpful. With few exceptions, the morning of the first day of trial will be extraordinarily hectic for the prosecutor and the court. It would not be unusual for the start of the case to be delayed by other cases, such as bail hearings, last-minute guilty pleas, and adjournment requests. During this interval, jurors will be waiting outside the courtroom and might become frustrated with what may appear to them to be pointless delay. Judges do not like to keep jurors waiting. *It is inconceivable that a judge would sit still while the attorney orally went through each point in the* Checklist of Things to Do at the Opening of Trial (*infra* Form 7.19A). Therefore, delete items from the list that are not relevant to the particulars of the case.

D. Jury Selection [§ 7.6]

Each trial is different, and assessing the type of juror wanted for the particular case, ideas for voir dire questions, and pattern or standard voir dire questions is crucial. The Jury Selection Form (*infra* Form 7.21B) is a sample form on which to record information obtained from jurors' questionnaires and the voir dire. It is often possible to obtain additional information about prospective jurors from readily available public sources, especially social media. This information should also be incorporated into the jury selection form or whatever other useful compendium of information will be used during the jury selection process.

Because a substantial amount of information must be recorded and reviewed rather quickly during the questioning, the form is designed for maximum brevity. Words commonly used to describe jurors are abbreviated to save space; the Jury Selection Code (*infra* Form 7.21A) explains the abbreviations. Create a workable form, personalized to the user. Test its utility by recording information while sitting in on the voir dire in another case. A spreadsheet program can greatly improve the accessibility of the information. While many lawyers may prefer to handwrite entries on a form during jury selection, a spreadsheet can also be used. Having an assistant take notes during the voir dire will aid the establishment of a rapport with jurors.

Whenever possible, address jurors by name. Prepare or obtain a diagram of the jury box with cells to record juror's names and responses. The particulars of juror seating can change from case to case, depending on various factors, including the number of defendants. If it is not possible to visit the courtroom before trial, consider calling the court clerk or a local trial lawyer to discuss the layout of the court regarding jury panel seating.

The questions posed to the jury panel are defense counsel's first opportunity to advise the jurors about the problems in the case and observe their reactions to those issues. By characterizing those facts in the most positive manner possible, counsel can use questions to evaluate how jurors will react to the facts in the case. It is the first opportunity to lay out the theme of the client's case.

It is important to create the perception that the jurors will be giving answers in a safe and reasonable atmosphere so that they feel free to express views that they otherwise might be reluctant to share.

The conduct of voir dire is a complicated and highly subjective process. The bottom line is to be comfortable with the approach to jury selection in order to obtain the necessary information from prospective jurors, so as to achieve the best jury panel. The rapport built with the jurors, from the moment they enter the courtroom, is of critical import. Always recognize that jurors are watching everything everyone does, listening to everything everyone says, and observing everyone's body language — especially your client's.

While it is important to ask insightful questions, be careful to choose the proper tone and phrasing in order to obtain comfortable responses from the jury panel. Properly done, it is possible to tell the story of the client's case by the questions posed and the order in which they are asked. The goal should be to identify the most problematic and outspoken jurors on the panel.

Developing knowledge about jurors' occupations, hobbies, prior jury experience, and feelings about crime in their community can be helpful. But in many cases, these issues will have already been delved into by the prosecutor or the judge and cannot be explored further. Rather, focus on aspects of the jurors' backgrounds that indicate how they might deal with the issues in the case. By the end of voir dire, the jurors should know what the case is about.

It may help to encourage unpopular responses. To obtain the best understanding of any hidden prejudices, address questions of racism, immigrants, and the most difficult aspects of the charges against the client in a way that can draw out responses from jurors. Treatises have been written on jury selection. Use available resources to be more comfortable when asking questions of jurors in order to delve deeply into their concerns.

Never ask jurors if they are prejudiced about a certain issue. Possibly preface a question by characterizing something as "Many Americans think that…." Adding some controversial subject matter that might have applicability to the case could encourage a potential juror to indicate whether they agree or disagree with that position. It becomes a public policy observation rather than an inquiry into the deeply held bias of the juror.

It is important to identify those panel members who are likely to be most influential or vocal. These jurors can be either the client's best advocate or worst nightmare. Look for the dynamic individuals who have leadership skills, such as business executives, managers, or sales people. Jurors who have had personal experience in matters related to the facts of the case might take a personal interest in the outcome to a greater extent than the other panel members. Most jurors are thought to have made up their minds about a case by the end of opening statements. As such, telling the story of the case and being persuasive in the jury selection process is crucial.

A well-conducted voir dire requires substantial skill, which can be developed over time by considering the objectives to be accomplished well before jury selection starts. After preparing voir dire questions, consider how to present them so that they do not necessarily suggest a right or wrong answer but will draw the potential juror's responses out for defense counsel to consider whether that juror should serve on the case. It is often helpful to pose the questions, as well as their order of presentation, to others in the office or even friends or family in order to get a better understanding of how the questions will be perceived.

If permitted by the judge, the use of written juror questionnaires to supplement voir dire can be very effective in obtaining opinions on issues that might be too sensitive to explore in open court. Such questionnaires are likely to be permitted only in the most complex cases, but there is no harm in asking to use them in any appropriate case.

Increasingly, judges are seeking to control the length and manner of voir dire in criminal cases. Some state court judges have taken to following the federal court practice of having the court pose all the questions to potential jurors during voir dire. This approach should be resisted whenever possible because it deprives the defendant of a critical opportunity to explore important issues of bias and prejudice among potential jurors and limits defense counsel's ability to establish a connection with those who will be deciding the client's fate.

Defense counsel should make sure to clearly understand the rules that the judge will use in the case so as to complete an effective voir dire for the client.

E. Opening Statements [§ 7.7]

Keep notes and ideas for the opening statement, and add notes taken during the prosecutor's opening statement. *See infra* Form 7.22A, Notes on Prosecutor's Opening/Closing. If, during the opening statement, the district attorney makes objectionable or prejudicial remarks or assertions that the prosecutor might not be able to prove, these should be noted on Form 7.22A, *infra*, together with actions taken by defense counsel, the substance of any sidebar conferences, and rulings by the court. It is imperative that any sidebar or in-chambers comments be placed on the record at the first possible opportunity to preserve the record for appeal.

If the prosecutor's comments in opening are such as to require a motion for mistrial, that motion must be made at that time, preferably outside the presence of the jury. Defense counsel will necessarily have to stand and say, "Objection!" and ask the court to be heard outside the presence of the jury.

The presentation of the opening statement should outline the facts of the case and the theory of defense so that the jury can appreciate what the defense focus will be. It is sometimes preferable to defer providing the defense opening statement until after the prosecution has rested. This is a relatively infrequent practice because many believe the opportunity to counter what the prosecution has just told the jury as soon as possible could be essential to the presentation of an effective defense. On the other hand, deferral of the opening statement prevents the prosecution from learning the theory of the defense and offers an opportunity to speak to the jury just before presenting the defense case.

An opening statement should present an outline of the defense case and provide a sense of what the evidence is likely to show from the defense point of view. It should also emphasize that the defense need not prove anything at trial because the burden of proving the defendant's guilt beyond a reasonable doubt rests entirely on the government. If the defense plans to present witnesses, there is no need to state specifically who might be called to testify, but it is best to indicate what the defense believes the evidence will show.

Determining how any negative evidence expected to be presented at trial will be handled is crucial to presenting the opening statement. It might be best to provide jurors with a sense of what they will be hearing and point out any concerns about the evidence so they are somewhat conditioned before the evidence is presented to them.

Each case should have a theme. The opening statement should be built around the introduction of that theme and what the evidence is expected to show. While it is improper to argue the case in the opening statement, it is not improper to emphasize the important aspects of the defense.

The opening statement structure then might, by way of example, include the following:

- A phrase to grab the attention of the jury.
- A formal introduction: "Your honor, counsel, ladies and gentlemen of the jury, my name is _______ and I represent [client name] in this matter."
- Presentation of the defense theory of the case. Use phrases such as, "go back with me now to [date of occurrence]; the evidence will show …; the facts will demonstrate that…." Name witnesses who will definitely be called and what they are expected to testify about.
- The story in a chronological manner.
- A roadmap, to let the jurors know the prosecution goes first because it has the burden of proof and then tell the jurors what the defense case is about and advise them that they will hear a summary of the evidence when the defense presents its closing argument.

Practice Tip. Proactively say in your opening statement that your client is *not guilty*.

Practice Tip. Act naturally (throughout the opening statement and the entire trial). Appearing uncomfortable will detract from the defense's message.

Depending on the type of case, consider seeking permission from the court to use technological aids or other demonstrative evidence in the opening statement. Do not attempt to do this without obtaining permission outside the presence of the jury. Use of photographs, charts, and other evidentiary matter that will be admitted, based on a stipulation, an agreement, or a motion in limine ruling, could assist the effectiveness of the presentation.

F. Defense and Prosecution Witnesses [§ 7.8]

Maintain a separate file for each witness, whether prosecution or defense. Each witness file should include sub-files for contact information, miscellaneous notes, and a draft examination. Here, “each witness” means all names that come up in reviewing the police reports and in the course of the defense investigation, including witnesses whose appearance at trial seems improbable. Issues in dispute and witness availability can change mid-trial, resulting in the unexpected appearance of a witness.

At trial, the hard copy file for that witness might contain nothing more than a police report in which the witness’s name is mentioned, but a separate hard copy file with the witness’s name on it will ensure that the report is readily available.

In the file for each witness, keep all documents, transcripts, and notes relating to that witness. Reasonable predictions can generally be made as to which witnesses the prosecution will call and in what order.

Preparing witnesses for trial is a time-consuming process. Defense counsel should personally interview each witness before that witness testifies. But there are many pitfalls in witness preparation, so carefully think through these pitfalls with respect to each individual witness, rather than adopting a uniform approach.

Communications between defense counsel and client are strongly protected by attorney-client privilege. *There is no such privilege with other witnesses in the case.* Therefore, the prosecutor is entitled to inquire into every detail of the defense’s interactions with other witnesses. If those interactions will not bear scrutiny, the client has been done a great disservice. If appropriate precautions are taken for each witness, damage can be avoided and the case may even be stronger.

The first issue to be addressed is whether to prepare the witness in the absence of an investigator. If the witness takes the stand and misrepresents defense counsel’s actions during the preparation session, only an investigator can repair the damage. Attorneys can testify in their own cases only under very unusual circumstances, *see* SCR 20:3.7, and those circumstances do not include taking the stand to contradict a witness’s testimony about what happened during trial preparation. *The client cannot fill the role of the investigator in this process.* Thus, an investigator should always be present during witness preparation, unless there is an unusual circumstance that justifies an exception to this default setting and the lawyer is confident that the benefits of a one-on-one meeting outweigh the risks.

On the downside, the presence of an investigator will make the witness more self-conscious and the interview less relaxed. For this reason and many others, the client cannot replace the investigator. By way of illustration, the decision to testify is the client’s, and that decision should not be burdened by imposing on the client the additional role of contradicting a witness on the particulars of defense counsel’s interactions with the witness during preparation. Although the client may be waiting outside the meeting room, the client should never be present during witness preparation. One way to reduce the effect of the investigator’s presence is to explain that the investigator is only there to take notes so that counsel can pay attention to the conversation with the witness. Consider instructing the investigator not to participate in the interview; this will minimize the risk that the witness feels that she or he is being grilled by a panel. Consider suggesting that the investigator gently follow up on points of concern by continuing the conversation while counsel leaves the room to make copies or take a phone call.

There are several classes of witnesses who may seem “safe” for one-on-one preparation. Examples are family members, good friends, spouses, and significant others. But always remain acutely aware that witness attitudes can change over the pendency of a case. It is possible that after an initial interview of a “safe” witness, in the interval before trial, a spouse, significant other, or friend will become alienated from the client and “switch sides,” creating a serious problem for trial. This can also occur during the sometimes-long interval between a trial preparation session and an adjourned trial date. An alienated witness might testify falsely concerning the defense’s trial preparation efforts and concerning claimed statements made by the client over the pendency of the case. This is yet another reason to regularly caution the client not to discuss the case with anyone other than defense counsel.

“Instructions for Witnesses” (*infra* Form 7.24A) offers some commonsense points that might be integrated into a witness preparation session. For a number of reasons, do not show the list to the witness or provide the witness with a copy.

First, both parties are entitled to require witnesses to produce materials they reviewed in preparation for testimony, so even if the witness does not bring the instructions to court, the prosecution is entitled to demand a copy of the instructions from defense counsel. *State v. Richards*, 21 Wis. 2d 622, 631, 124 N.W.2d 684, 689 (1963). Any reasonably skilled trial attorney could do a lengthy and devastating cross-examination based on the details of this list of considerations.

Second, remain acutely aware that while the case holds great interest for defense counsel and client, that level of interest may not be shared by witnesses—even friendly witnesses. Carefully prepare for meeting with the witness so that key points are firmly in mind. Then defense counsel can give full attention to the witness during the interview, adjusting counsel's manner, as well as the length and detail of the interview, to the witness's display of interest. By no means should each point in Form 7.24A, *infra*, be covered with every witness, because this will exhaust the witness's patience and engagement with no offsetting benefit. No witness will be able to recall each point mentioned on the form. A critical aspect of witness preparation is putting the witness at ease about his or her time on the witness stand. Anxiety arising from a perceived need to remember the many points on Form 7.24A, *infra*, will overwhelm counsel's other efforts.

Fortunately, many of the points on Form 7.24A, *infra*, will arise naturally during the course of the meeting with the witness. It is not at all unusual for a witness to ask what to wear at the trial. If the issue arises in that way, the message will feel more conversational than directive. If there are concerns that the witness might dress inappropriately, consider simply observing that "many witnesses ask what they should wear." The need to demonstrate respect for the court and the jurors suggests a more conservative approach to proper courtroom dress, but as with so many issues, fixed standards may disserve the client. Many jurors will view very favorably a witness who comes to court on a brief break in the workday, whether from a construction site or a nursing shift. The witness's appearance will lend greater interest to preliminary inquiries about the nature of the witness's employment and the circumstances of their appearance that day. A witness comment that she is due back at 3:00 p.m., and the response to the effect that "We'll try to get you back to work on time," will place additional pressure on the prosecutor during cross-examination. More frequent than a need to promote minimum dress standards is the need to discourage overdress. Given the solemnity of the proceedings, male witnesses often ask if they should wear a suit and tie, garb likely to make the witness's manner more formal and appearance less accessible to jurors. "Fancy occasion" dress and makeup are likely to produce similar effects with female witnesses.

A number of critical points should be made with every witness. Consider framing the conversation from the outset with these observations:

- "I appreciate your time and effort in meeting with me."
- "My client and I hope that you will tell the truth and call the shots the way you see them, with absolutely no concern about whether your testimony will help or hurt the case."
- "The judge and jury will expect that, too, because you will be under oath."
- "For example, you should be completely positive and unembarrassed in answering the following questions:"
    - "Did you meet with the defense attorney to discuss your testimony?"
    - "Is the defendant your friend?"; and
    - "You wouldn't want to see the defendant convicted, would you?"
- "Because I have no attorney/client confidentiality with you, I would like to limit the meeting to my questions about what happened and any questions you might have about what to expect at court."

The second and third bullet points are essential for every witness. Covering these points is often referred to as "inoculating the witness." Learning that the witness is expected to provide full and unapologetic candor instead of advocacy will help to put the witness as ease. Critically, though, these points will provide defense counsel and the witness with obvious responses to a cross-examination suggesting witness prejudice.

Though less significant than witness inoculation, the following points should be made with all friendly witnesses:

- The witness is under no obligation to "make the case" because defense counsel will pull together the testimony of many witnesses to show the jury the whole truth.

- Even if there were no oath, telling the truth would be the very best trial strategy.
- No witness or group of witnesses could possibly keep track of a bunch of lies and stay consistent, so liars will be tripped up and end up hurting the defendant's case.
- People are comfortable telling the truth and uncomfortable lying, and juries can sense this kind of discomfort.
- It is not the job of any witness to be an advocate for the client; it is the job of the attorney to present the truth and show the jury why the truth demonstrates the client's innocence. Therefore, the witness should not be surprised if the witness's testimony brings out facts that might appear harmful to the defendant; these facts will help prove the defendant's innocence.

Move for an order excluding and separating witnesses and preventing them from communicating with one another until they have been examined or until the trial or hearing is ended. *See* Wis. Stat. §§ 757.14, 906.15; SCR 61.01–.12; *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *State ex rel. La Crosse Trib. v. Circuit Ct.*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983).

> ***Comment.*** While the 2020 amendment to Wis. Const. art. 1, § 9m—commonly known as "Marsy's Law"—did not change the language in Wis. Stat. § 906.15, which permits an exclusion of a victim, the constitutional amendment seems to prohibit the exclusion of a victim at trial if the victim elects to be present. Accordingly, the laws are not harmonized and may increase the necessity of litigation.

Move for an order directing the prosecutor to communicate the exclusion and separation order to all witnesses and precluding the state, its representatives, and witnesses from sharing witness testimony with witnesses who have yet to testify, pursuant to Wis. Stat. § 906.15(3) and *State v. Copeland*, 2011 WI App 28, ¶ 18, 332 Wis. 2d 283, 798 N.W.2d 250.

This is critical in every case. Notwithstanding these efforts, witnesses often try to communicate with each other during trial, especially now that there are so many ways to do so including, but not limited to, voice, text, email, Facebook, Twitter, Instagram, and Snapchat. If possible, defense counsel should have a staff person in the hallway to greet subpoenaed witnesses, remind them of the order of presentation, and let them know what the court's schedule will be for the portion of trial for which they will be present. The staff person can also monitor any exchanges that might be observed between prosecution witnesses, in which case the staff should be told not to intervene directly but instead to let defense counsel know of any perceived violation at the earliest opportunity.

The later arrival of defense witnesses creates a risk that they will inadvertently violate the sequestration order. Form 7.25B, *infra*, is a cover letter, served with subpoenas, asking witnesses to assume that the judge will enter such an order and to conduct themselves accordingly.

> ***Practice Tip.*** Given the existence of Marsy's Law, it might be wise to request that the state be required to call the alleged victim first in the state's case in chief if the judge refuses to order that the alleged victim be sequestered. Having the alleged victim testify first obviates the risk that the person will form or manipulate testimony based on other witness accounts. A more just approach would be to ask for sequestration only for opening statements, such that the alleged victim is not privy to the defense's theory before testifying. Defense attorneys lose nothing by making the request.

G. The Use of Technology at Trial [§ 7.9]

Technology can make complex evidence more understandable to a jury. Some simple uses of technology include timelines, charts, chains of events, photographs, and videos of actual events. Some more advanced uses of technology include animations, recreations, and illustrations.

Technology is a tool, not the end in itself. Courts have recognized computers to be useful devices for trial, as long as the presentation is relevant and fairly and accurately reflects or enhances the testimony and other evidence and helps the jury understand the issues presented.

Technology can be used to effectively create and display demonstrative aids and summaries, as well as to publish images of real evidence. Counsel should always avoid using inaccurate evidence developed or enhanced by technology, because such use would harm the case presentation and the lawyer's credibility and reputation.

The improper use of technology at trial can raise ethics concerns. A lawyer is required to possess the legal knowledge, skill, and thoroughness in preparation necessary for a proper client defense. SCR 20:1.1 (competence). A lawyer's duty of competence includes being capable of operating any technology used at trial. This includes having a competent backup plan if the technology fails.

Lawyers also have an obligation to keep fees reasonable. SCR 20:1.5 (fees). While technology is not cheap, a lawyer must determine whether technology can be made economically feasible and therefore worth utilizing to better present the client's defense.

Care should be taken to avoid technology being manipulative or distracting. Just as a lawyer cannot knowingly make a false statement of fact or law to a tribunal, it is improper to knowingly misrepresent or mischaracterize any facts in the case through the use of technology. *See* SCR 20:3.3 (candor toward the tribunal). In one case, an appeals court chastised a prosecutor for using a computerized PowerPoint presentation that contained an image of curtains engulfed in flames next to text listing the elements of arson in the first-degree during closing argument. The picture of flaming curtains was not in evidence and was not probative of anything at issue in the case. The court noted that the material was irrelevant, was used either to distract or to prejudice the jury, and was thus unnecessary. But the court found the error harmless under the facts of the case. *State v. Robinson*, No. 47398-1-I, 2002 WL 258038, at *3 (Wash. Ct. App. Feb. 25, 2002) (unpublished opinion not citable per Wash. R. Gen. G.R. 14.1).

When a prosecutor in closing argument used an audio recording of the defendant's police interview about what he had done the night of a murder, along with a slide presentation, such that every time he mentioned the victim's name, an image was shown of the victim while she was alive; and every time he used the word "panic," the prosecution displayed a gruesome murder scene image of the victim's corpse, the court rejected the defense challenge on appeal. The court made this holding despite the fact the prosecutor knew the references to "panic" actually related to the defendant's fear he might have been seen committing a lewd and lascivious act near the victim's home on the night she was killed. *State v. Skakel*, 888 A.2d 985, 1067–70 (Conn. 2006) *opinion superseded on reconsideration by Skakel v. Commissioner of Corr.*, 188 A.3d 1 (Conn. 2018) (granting habeas petition based on ineffective assistance of counsel due to trial counsel's failure to produce an alibi witness).

Proper preparation for the use of technology is of utmost importance. It is always necessary to request permission of the court to use such technological aids to display evidence. Consider bringing a motion in limine before trial to seek the court's permission to utilize any anticipated technological means of evidence presentation.

The following are a few helpful guidelines to assist in the effective use of technology at trial:

1. Decide how to use technology, given the local rules and the judge's preferred practices.

2. To the extent possible, provide opposing counsel with a copy of defense exhibits and solicit a stipulation so as to avoid any issue regarding admissibility or use during trial. Seek court approval of any technology that might be used during the opening statement. One of the worst things that can happen during trial is for the court to prevent the use of a technological presentation that is central to an effective opening statement.

3. Practice with software and hardware before trial to iron out any bugs or kinks in the use of the equipment.

4. Ascertain what equipment is available in the courtroom well before trial.

5. Visit the courtroom before trial to make sure of the layout and sight lines.

6. Evaluate whether it would be possible to share equipment with opposing counsel.

7. Review the applicable evidentiary rules.

8. Admit all exhibits into evidence, preferably in hard copy format, but in electronic format when necessary. Remember that an appellate court will be unlikely to review evidence that cannot be read or seen easily. When submitting electronic evidence such as body camera footage or any video footage, make sure to announce on the record the time stamps for starting and

stopping the video. It is important to admit only the portions of the videos that will be played into the record. Do not admit the entire file, especially if there are portions rife with hearsay, bad facts, etc.

9. Lay a proper foundation for the demonstrative evidence before displaying it to the jury.

10. Evaluate whether an item that is to be used as a demonstrative aid (*see infra* § 7.11) is likely to occasion an objection on grounds of relevancy, hearsay foundation, or some other basis.

11. Make sure all exhibits are properly marked before using them. If a witness draws on a large drawing pad chart or photograph, make sure it is easily reviewable by an appellate court by taking a picture of the final version of the exhibit and asking the court to include it in the record. The exhibit may be designated with the letter "a" after the number to indicate it is a sub-exhibit of the original.

12. Make sure to have sufficient computer and printing equipment available for use during trial and to have enough copies of each exhibit to be able to provide one to every jury member.

13. PowerPoint presentations can be very effective if certain basic rules are followed to ensure maximum impact:

    a. Use a large enough font and not an overwhelming amount of text.
    b. Use the slides to summarize various points; explain them rather than read them to the jury.
    c. Use colors properly for emphasis and interest.
    d. Consider using motion to retain attention.
    e. Do a practice run-through of the PowerPoint presentation before trial.
    f. Have a backup copy on either a flash drive or CD.
    g. Have paper copies available.
    h. Do not attempt to use this technological aid, or any other, unless sufficiently capable of using it effectively and not detracting from the presentation.

14. Simulations and animations must be based on scientific principles. If serving as a basis for the opinions being offered by an expert, the simulations must meet the same standards governing the other requirements for provision of expert opinion, including the standard set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); Wis. Stat. § 907.02; *see also United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) ("At this point, [F.R.E.] 702 has superseded *Daubert*, but the standard of review that was established for *Daubert* challenges is still appropriate."). Courts will sometimes give cautionary instructions regarding consideration of computer simulation evidence or illustrative aids. In addition, some courts have developed tests for the admissibility of computer-generated evidence, including animations, along the following lines:

    a. Is the animation properly authenticated as a fair and accurate representation of the evidence it purports to portray?
    b. Is it relevant under Wis. Stat. §§ 904.01 and 904.02?
    c. Is its probative value outweighed by the danger of unfair prejudice under Wis. Stat. § 904.03?

    It is likely the courts will review the computer animations carefully to ensure that a proper foundation has been provided and that the animation is relevant, accurate, and not unduly prejudicial. *State v. Denton*, 2009 WI App 78, ¶¶ 7–23, 319 Wis. 2d 718, 768 N.W.2d 250 (holding that the prejudicial effect of computer-generated animation introduced by a witness for the state who had no personal knowledge of what was depicted in the animation outweighed its probative value).

15. Whenever possible, the lawyer should utilize the services of another person during trial to ensure the technology being used is effectively and efficiently presented. This will also permit the lawyer to focus on the critical issues that are involved in the cause being tried.

Technology can be extremely helpful during trial. But it is very important that the lawyer take sufficient precautions and plan effectively so that the technology can be used to enhance the presentation of the client's cause.

H. Exhibits and Motions [§ 7.10]

Keeping track of exhibits and motions in the midst of even a short trial can be worrisome. Which exhibits were offered and by which party? Which of these exhibits were received as evidence and which were rejected? Were any of the exhibits in electronic format not offered in paper form? Always make sure the electronic record is reduced to written format if at all possible so an appellate court will be able to understand what the exhibits presented actually said.

Keep in mind that local rules may require counsel to have a transcript prepared of an audio or video recording used as an exhibit. *See* SCR 71.01(2)(e) (court reporter not required to transcribe recording). Even if the circuit court does not require a transcript, the attorney should consider the potential importance of a transcript for appellate review. If such electronic evidence is to be relied on in the case presentation, make sure any concerns about software compatibility, hardware availability, and any evidentiary issues are dealt with before trial by a motion in limine or otherwise. Different courthouses and courtrooms typically have vastly different equipment available, often making it preferable for the attorney to arrange for the necessary equipment. Judges always prefer advance notice to a delay mid-trial with jurors sitting in the jury room cooling their collective heels.

What motions were made and by which party? What was the nature of each motion, and what were the grounds? Which motions were granted, which were denied, and for which was a ruling reserved? Forms 7.26A and 7.27A, *infra*, can be used to keep track of exhibits and motions during trial. The Trial Motions Checklist, *infra* § 7.18, can serve as a reminder of motions that may be appropriate during trial. For any motions in limine that the court withheld ruling on at the pretrial hearing, make sure to obtain a final ruling before any affected witness testifies.

Keep motions at the ready, and be prepared to file them with appropriate authority cited as to any evidentiary issues that can reasonably be anticipated, or that can be researched on the fly if an unexpected issue crops up. Use a lunch or overnight break in the trial to prepare any additional motions and obtain case law citations supporting the client's position. If counsel is fortunate enough to have a law clerk or another lawyer assisting with the trial, delegate that task to him or her. With electronic research readily available, it is often possible to provide a court with citation to relevant case law or statutory support for the client's position, even if a formal filing cannot be made.

I. Demonstrative Evidence [§ 7.11]

Visual communication has fast become the most persuasive means of conveying a message to a jury. "Showing" rather than just "telling" can assist a jury's understanding of the concepts involved in a case in a far more concrete fashion than simply hearing a witness talk about them. Photographs, charts, diagrams, maps videos, x-rays, models, and other physical items are all examples of such evidence. This is the section of the Trial Notebook, then, in which to list the various items of demonstrative evidence to be used during the trial.

There are countless items that can be used as demonstrative aids, limited only by the bounds of propriety and the lawyer's imagination. Wis. Stat. § 904.01 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test, then, is whether the evidence is probative of a proposition being offered and whether the proposition is one of consequence to the determination of the action.

Demonstrative, as opposed to "real" evidence, covers those tangible items offered at trial that are used to assist the trier of fact in understanding the testimony or other evidence. The trial lawyer must take care to "stay real" so as not to lose the jury by use of demonstrative aids that overstate or exaggerate, or are just not helpful.

Some of the most often used types of demonstrative evidence are the following:

- Diagrams;
- Maps;
- Models;
- In-court demonstrations;
- Recordings: sound and video;
- Photographs: actual size or enlargements (preferred);
- Charts;

- Spreadsheets; and
- PowerPoint presentations.

Used wisely and well, demonstrative evidence can assist the presentation of the defense, making the jury focus on the flaws in the prosecution's case, and help the trier of fact appreciate the points defense counsel is trying to emphasize.

J. Rebuttal Witnesses [§ 7.12]

This section is the place to record information about witnesses called in rebuttal and notes about their testimony, along with the attorney's ideas for surrebuttal. Form 7.23A, Notes on Witnesses, *infra*, is a convenient form on which to record this information. The defense need not give any notice on a witness list for a rebuttal witness. Even if defense counsel's investigator has prepared a report before trial, the defense attorney need not disclose that report if the attorney is calling the witness only to rebut evidence the state presented in its case in chief. Use caution, however, when determining whether this witness is essential to the defense case and whether the case will be negatively affected by including the person's name on a witness list. If a judge perceives an attorney's attempt to describe a witness as a rebuttal witness as sandbagging or skirting of discovery obligations, the attorney could end up unable to call the witness. If you list any witness on your witness list, however, you are required to provide any written reports of their statements under Wis. Stat. § 971.23(2m)(a).

Saving a witness for surrebuttal can be risky. If the government calls no rebuttal witnesses, there will be no way to get the testimony of that witness before the jury. (There would be nothing to "surrebut.") Accordingly, make certain that any witnesses withheld from testifying in the defendant's case in chief do not have such crucial information for the defense that, if they are not called, the client's outcome could be negatively affected.

K. Jury Instructions [§ 7.13]

The court instructs the jury on the law; the jurors in turn apply the law to the facts as they find them. As noted in section 7.1, *supra*, "the law" is not provided to the jury as statutory language; it is provided to them in the form of instructions, usually from *Wisconsin Jury Instructions—Criminal*. Because the jury will only know the law through instructions provided by the court, in a very real sense the jury instructions are the law. At the earliest possible point in representing the client, place the instructions relevant to the case in the trial notebook and refer to them frequently for help in analyzing evidentiary and trial strategy questions.

This section of the trial notebook is also the place to file ideas about jury instructions, a copy of the table of contents from the *Wisconsin Jury Instructions—Criminal*, the pattern Wisconsin jury instructions for the offense or offenses being tried and any lesser-included offenses, and other selected pattern instructions (e.g., for burden of proof).

The instructions the defense drafts to suit the particular case should also be kept in this section. The defendant is entitled to have the jury instructed on the theory of defense if the instruction is requested, is supported by the evidence, and is not adequately explained in other instructions. *See, e.g.*, *State v. Coleman*, 206 Wis. 2d 199, 212–13, 556 N.W.2d 701 (1996). The requested instruction must not, however, simply highlight evidentiary facts, especially if pattern instructions cover the general issue. *See, e.g.*, *State v. Amos*, 153 Wis. 2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989); *State v. Roubik*, 137 Wis. 2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987). In deciding whether the instruction should be given, the court must view the evidence in the light most favorable to the defendant. *See, e.g.*, *State v. Jones*, 147 Wis. 2d 806, 809, 434 N.W.2d 380 (1989); *State v. Giminski*, 2001 WI App 211, ¶ 8, 247 Wis. 2d 750, 634 N.W.2d 604. If the circuit court's instructions adequately cover the law applied to the facts, a reviewing court will not find error in refusing special instructions, even though the refused instructions are not erroneous. *See, e.g.*, *State v. Hampton*, 207 Wis. 2d 367, 385, 558 N.W.2d 884 (Ct. App. 1996); *Amos*, 153 Wis. 2d 257.

When the jury expresses confusion about the instructions and when relevant material is available to explain or supplement them, the court has discretion regarding whether reinstruction is necessary and regarding the content and format of any reinstruction. *State v. Hubbard*, 2008 WI 92, ¶ 29, 313 Wis. 2d 1, 752 N.W.2d 839. Thus, if the jury submits a question about an instruction, the defense attorney should consider requesting a response to clarify the previous instruction.

L. Closing Argument [§ 7.14]

The closing argument can, and often should, be prepared in advance of trial. Notes and ideas for the closing argument can be kept in this file. It is also a good idea to draft an outline of the planned closing argument.

A blank copy of Notes on Prosecutor's Opening/Closing (*infra* Form 7.22A) should also be kept on hand during the trial for recording notes on the prosecution's closing argument.

An effective closing argument should be engaging and, whenever appropriate, involve proper emotional nuance. During the closing, refer to the evidence admitted during the trial, and characterize it in the manner in which it should be perceived by the jurors. Emphasize all the facts that support the defense's claims, while noting the weaknesses and inconsistencies of the government's case. While summarizing the favorable facts can be helpful, it is often best to build a framework that provides the jurors with a suggested approach to interpreting the evidence in the case in a manner favorable to the client. During closing argument, be sure to clear up any inconsistencies that may have been developed during the trial and focus on the burden of proof being on the government rather than on the defendant.

It is important to be well organized and to effect a proper demeanor before the jury. It is usually unhelpful to be dismissive, demeaning, or inappropriate. When appropriate, the use of demonstrative aids and technology can be effective in delivering closing argument. *See supra* §§ 7.9, .11.

Focus on reasonable doubt. Emphasize that the government has to prove each and every one of the elements of the crime *beyond a reasonable doubt*. Ultimately, the goal is to convince the jury, through presentation of an effective closing argument, that the client should be acquitted.

It may be wise to concede certain points that are obvious in order to focus on those areas that present an opportunity for a successful outcome on particular issues.

The closing argument provides an opportunity to bring home the theme of the defense's case. It is appropriate to refer to the comments made in voir dire or opening statement, focus on any areas of the prosecutor's opening statement that provide a basis for attack or challenge, and prepare the jury for the prosecutor's rebuttal. Select a style of presentation that will convince the jury of the rightness of the defense's cause.

Perhaps the best analysis of effective argument is the old adage—"Tell them what you're going to tell them. Tell them. Then tell them what you told them." Use whatever arguments and presentation devices that will make the defense case closing argument most effective.

M. Trial Brief [§ 7.15]

Depending on the case, it might be helpful to prepare and file a trial brief. This document can be used to accomplish several purposes. The brief can provide the court with legal argument on evidentiary issues expected to come up during trial, as well as provide the basis for the defendant's potential request for a particular jury instruction. This section should be devoted to law and research materials not related to other portions of the file.

The trial notebook, for example, can contain legal memoranda written in anticipation of trial, briefs filed in the case, and citations to decisions that may become relevant. This section is a good place to collect notes on points of law counsel may argue to the court and to list the elements of the offense or offenses charged and any lesser-included offenses.

N. Sentencing [§ 7.16]

The attorney should keep ideas and notes on sentencing in this file. To be prepared in the event that the defense is unsuccessful at trial, the attorney should gather material on mitigation and extenuation and file it here.

Sentencing is the last line of defense. But conducting an effective sentencing presentation often starts with an evaluation of the client's circumstances well before trial. Beginning counseling or other positive changes in the client's lifestyle, obtaining character reference letters from family and friends when appropriate, and studying what other courts have issued as sentences in similar matters, both locally as well as statewide, can play a large role in an effective sentencing argument. Use of technological aids in preparing for the sentencing can often be invaluable. Creativity in the crafting of an effective sentencing presentation can be helpful.

When positive information is available, it should be included in the sentencing brief submitted to the court, along with all character letters and other supporting documentation. To be most effective, this material should be provided to the court well in advance of the sentencing to ensure the court will have adequate time to review it.

In appropriate cases, a private presentence investigation conducted by a skilled and experienced investigator can be of substantial value. If the state requests that the Department of Corrections conduct a presentence investigation, the defense attorney should request that the report not contain a sentencing recommendation. For a discussion of preparing for sentencing, see chapter 8, *infra*.

O. Appeal Notes [§ 7.17]

Potentially appealable issues generally come up before, as well as during, trial. The attorney should maintain a record of such issues in this file. Form 7.28A, Appealable Issues, *infra*, is a convenient form on which to note significant rulings by the court that have gone against the defense. The form can serve as a checklist to ensure that a complete record is made on each issue.

It is critical to protect the record at trial in order to preserve all issues that could form the basis for an appeal. Appellate case decisions are replete with observations that issues were waived or not properly preserved by trial counsel and therefore will not be considered on appeal. Make sure all exhibits are identified, offered, and accepted. If necessary, create a photo or smaller version of an exhibit to place in the record—for example, a large chart drawn on a blackboard or a physical item of evidence that cannot be included in the court file.

Make sure that a description of every sidebar conference and ruling is placed on the record as soon as there is an opportunity to do so. Keep good notes of what the court says during such conferences. If there is a dispute when the matter is ultimately placed on the record, make clear counsel's recollection of the entire discussion. Make an offer of proof as to any and all matters the court considered but prevented counsel from addressing before the jury. If there was an objection the court sustained that blocked critical evidence, be sure to place a summary of the argument and the court's ruling regarding the matter on the record. Think about requesting the court to reconsider its ruling on the issue.

Be vigilant in creating and protecting the record so the appellate court can get the full flavor of what occurred at trial and consider all issues of import to the defense.

For a discussion of appeal rights, see chapter 9, *infra*.

III. Trial Motions Checklist (CRM-0104) [§ 7.18]

> ***Note.*** The following checklist is a list of trial-related motions that can be filed in a criminal case. It is not an exhaustive list and cannot substitute for the defense attorney's independent judgment. The range of possible motions is limited only by the attorney's imagination.
>
> The timing of these motions depends on when the legal issue arises, local practice, and strategic considerations. Some motions listed below may be filed and determined before trial, and some may be combined (for example, a motion for specified procedures to select the jury could include several of the motions listed). Many courts establish time limits for filing motions before trial. It is imperative that counsel rigidly adhere to any such time limits.

Jury and Jury Selection

See U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7; Wis. Stat. ch. 805; Wis. Stat. §§ 972.01, 972.02.

☐ Motion challenging jury array. Wis. Stat. § 805.08.

☐ Motion for inspection of court records regarding jury selection.

☐ Motion for sequestration of jurors during voir dire. Wis. Stat. § 972.12.

☐ Motion for individual voir dire.

☐ Motion to prevent state from investigating prospective jurors.

☐ Motion to disclose past and present relationships, associations, and ties between district attorney and prospective jurors. Wis. Stat. § 805.08(1).

☐ Motion to restrict prosecutorial strikes. Wis. Stat. § 972.03.

☐ Motion to increase number of peremptory challenges. Wis. Stat. § 972.03.

☐ Motion for discovery of information on prospective jurors. Wis. Stat. § 805.08.

☐ Motion relating to jury note-taking. Wis. Stat. § 972.10(1)(a).

☐ Motion for jury view. Wis. Stat. § 972.06.

☐ Motion to instruct jurors not to read newspapers, participate in social media discussions, or conduct any computer or other electronic searches relating in any way to the case, the parties, or the attorneys.

Preservation of the Record

☐ Motion for verbatim record of all proceedings (voir dire, opening statements, closing arguments, conferences and other proceedings out of jury's presence, instruction conferences and instructions, etc.). SCR 71.01.

☐ Motion for daily transcripts.

- ☐ Motion for permission to record court proceedings.
- ☐ Motion to photograph court proceedings.
- ☐ Motion to include in record copy of district attorney’s entire file viewed by court at in camera inspection. Wis. Stat. § 971.31.
- ☐ Motion to include transcript of prior hearings in record.
- ☐ Motion to photograph charts, maps, diagrams, and other drawings made by witness at trial.
- ☐ Motion to inspect and copy district attorney’s entire file. Wis. Stat. § 971.31.
- ☐ Motion to compel television/radio station to preserve or copy and produce recordings.
- ☐ Motion for photographic record of evidence returned to owner. Wis. Stat. §§ 968.20, 972.11(4).
- ☐ Motions in limine. *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386; *supra* § 5.55, Form 5.55A.
- ☐ *Daubert* motion. Wis. Stat. §§ 907.01, 907.02; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Court Personnel

- ☐ Motion for substitution of judge (available at trial under limited circumstances involving assignment of a new judge within 48 hours before trial). Wis. Stat. § 971.20(5).
- ☐ Motion to recuse. Wis. Stat. § 757.19.
- ☐ Motion for impartial bailiff (or other court personnel).
- ☐ Motion for special prosecutor. Wis. Stat. § 978.045.
- ☐ Motion to disqualify special prosecutor. Wis. Stat. § 978.045.

Miscellaneous

- ☐ Motion for order sequestering witnesses. Wis. Stat. § 906.15.
- ☐ Motion to adjourn or for continuance. Wis. Stat. § 971.10(3).
- ☐ Petition for leave to appeal nonfinal order. Wis. Stat. § 809.50.
- ☐ Motion to have witness declared hostile. Wis. Stat. § 972.09.
- ☐ Motion to require prosecutor to elect particular theory of offense (e.g., principal as opposed to accessory, or aider and abettor as opposed to conspirator). Wis. Stat. §§ 802.06(5), (6), 939.05.
- ☐ Motion to determine relevant number of prior convictions for defendant or other witnesses (number of convictions that are admissible to impeach credibility). Wis. Stat. §§ 906.09(3), 971.23(1)(c), (f).

☐ Motion for payment of reasonable witness expenses. Wis. Stat. §§ 885.09–.10.

IV. Trial Checklists [§ 7.19]

Commentary and Instructions for Forms 7.19A–7.19B

Form 7.19A	Checklist of Things to Do at the Opening of Trial (CRM-0105)
Form 7.19B	Checklist of Things to Do During Trial (CRM-0106)

In the rush to begin a trial, it is easy to forget some of the many details that must be addressed. Form 7.19A, *infra*, is designed to help ensure that important matters are not overlooked. The items included on the checklist are common to almost every criminal trial. Additional matters peculiar to the particular case should be added to the list as appropriate.

Form 7.19B, *infra*, serves as a checklist for the many details that come up during trial. Frequently, the defense attorney wants to make objections or motions for a mistrial immediately following the offending action, but the trial judge will not hear them at that moment. Record these items on Form 7.19B, *infra*. Even if the attorney knows how the judge is likely to rule, the attorney must still make a record. Other items that the attorney should add to the checklist include issues or points of law that will have to be researched, memorialization of sidebar conferences, and questions the attorney wants to remember to ask a witness.

For a more complete listing of matters to attend to at trial, see the Checklist for Trial, *supra* ch. 1.

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.19A Checklist of Things to Do at the Opening of Trial (CRM-0105)

Checklist of Things to Do at the Opening of Trial

Client's Name ______________________ *(3.01)* ______________________

Case No. ______________________ Page No. ______________________

- ☐ Renew and preserve any jurisdictional objections.
- ☐ Renew discovery demands or motions. Wis. Stat. § 971.23.
- ☐ Move for copies of statements of all prosecution witnesses, if not previously provided by the state. Wis. Stat. § 971.23(1)(e).
- ☐ Renew any demands for exculpatory evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977) (*distinguished by Disciplinary Proceedings Against Zapf*, 2019 WI 83, 388 Wis. 2d 1, 930 N.W.2d 202).
- ☐ Move for an order excluding and separating witnesses, or preventing them from communicating with one another, until they have been examined or until the trial or hearing is ended. Wis. Stat. § 906.15.
- ☐ Move to exclude or limit the use of electronic media or still photography in the courtroom. Wis. Stat. § 757.14; SCR 61.01–.12; *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *State ex rel. La Crosse Trib. v. Circuit Ct.*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983).
- ☐ Move to limit trial publicity by the prosecutor. SCR 20:3.6.
- ☐ Move the court to disclose the opening instructions. Wis. Stat. § 972.10(1)(b).
- ☐ Make any motions relating to jury note-taking. Wis. Stat. § 972.10(1)(a).
- ☐ Move to record the voir dire, opening statements, and closing arguments. SCR 71.01(2).
- ☐ Challenge the prosecutor's use of peremptory strikes that limit or eliminate minority representation on the jury. *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Jones*, 218 Wis. 2d 599, 581 N.W.2d 561 (1998); *State v. Gregory*, 2001 WI App 107, 244 Wis. 2d 65, 630 N.W.2d 711.
- ☐ Challenge the prosecutor's use of peremptory strikes based on sex of prospective jurors. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *State v. King*, 215 Wis. 2d 295, 572 N.W.2d 530 (Ct. App. 1997); *State v. Jagodinsky*, 209 Wis. 2d 577, 563 N.W.2d 188 (Ct. App. 1997).

Form 7.19B Checklist of Things to Do During Trial (CRM-0106)

Checklist of Things to Do During Trial

Client's Name ____________________ *(3.01)* ____________________

Case No. ____________________ Page No. ____________________

☐ Make all proper objections. Be brief, stating "Objection" and the grounds of the objection. Be prepared to request a sidebar conference to go into further detail with the court if that opportunity is offered. Do not argue the matter in front of the jury.

☐ Make motions for mistrial if appropriate. This should be done outside the presence of the jury.

☐ Review each witness checklist to ensure that all the testimony has been presented or all desired cross-examination has been pursued.

☐ Move for dismissal at the close of the state's evidence. Grounds for the motion must be stated with particularity. Wis. Stat. § 805.14(3), (6).

☐ At the close of all the evidence, move to dismiss or for a directed verdict of acquittal. Present a trial brief in support of the motion. Wis. Stat. §§ 805.14(4), 972.10(4).

☐ Renew all motions for mistrial.

☐ Make a record of everything relating to the case (and potentially relevant to postconviction relief) that was done "off the record" and has not already been recorded.

V. Trial Outline [§ 7.20]

Commentary and Instructions for Form 7.20A

Form 7.20A	Trial Outline (CRM-0107)

The Trial Outline (*infra* Form 7.20A) is the blueprint for the trial as seen by the attorney before the trial begins. In advance of trial, the attorney needs to think through the probable order of the witnesses for the prosecution and decide on the order of the witnesses for the defense. The attorney also should anticipate potential rebuttal witnesses. On Form 7.20A, *infra*, prosecution witnesses are identified by number, defense witnesses by capital letters, and rebuttal witnesses by lowercase letters.

Deciding the order of defense witnesses in advance is far preferable to simply calling them as they happen to be available in the corridor outside the courtroom. The defense case will appear in a more favorable light to the jurors because they will be hearing the witnesses in a logical order.

It is best to have a theory as to the order of presentation for the case. Preparing in advance for the order of witnesses and presentation of evidence will make it appear to the jury that the attorney is prepared, knows the case, and has a method for its presentation.

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.20A Trial Outline (CRM-0107)

Client's Name ______________ *(3.01)* ______________

Case No. ______________ Page No. ______________

Prosecution Witnesses

1. ______________
2. ______________
3. ______________
4. ______________
5. ______________
6. ______________
7. ______________
8. ______________
9. ______________
10. ______________
11. ______________
12. ______________
13. ______________
14. ______________
15. ______________
16. ______________
17. ______________
18. ______________
19. ______________
20. ______________

Client's Name ____________________ *(3.01)* ____________________

Case No. ____________________ Page No. ____________________

Defense Witnesses

A. ____________________
B. ____________________
C. ____________________
D. ____________________
E. ____________________
F. ____________________
G. ____________________
H. ____________________
I. ____________________
J. ____________________
K. ____________________
L. ____________________
M. ____________________
N. ____________________
O. ____________________
P. ____________________
Q. ____________________
R. ____________________
S. ____________________
T. ____________________

Client's Name ______________ *(3.01)* ______________

Case No. ______________ Page No. ______________

Rebuttal Witnesses

a. ______________
b. ______________
c. ______________
d. ______________
e. ______________
f. ______________
g. ______________
h. ______________
i. ______________
j. ______________

VI. Jury Selection [§ 7.21]

Commentary and Instructions for Forms 7.21A–7.21B

Form 7.21A	Jury Selection Code (CRM-0108)
Form 7.21B	Jury Selection Form (CRM-0109)

During voir dire, information often comes in too fast for the attorney to make complete notes on each juror. Most experienced trial attorneys develop some sort of shorthand to record information quickly and in a form that they can review easily during jury selection. Form 7.21B, *infra*, is a sample jury selection form. Form 7.21A, *infra*, explains the abbreviations used.

The jury selection form may not be adequate for every case. Think through voir dire in advance and modify the form as necessary to accommodate the information needed in the case at hand. If at all possible, test the form while sitting in the gallery during voir dire in another case.

In Wisconsin, attorneys are usually given a list of potential jurors or a set of cards with much of the basic information about the potential jurors already filled out.

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.21A Jury Selection Code (CRM-0108)

N Name
M F Male or Female
Y M O Young, Middle-Aged, or Old
W B H O White, Black, Hispanic, or Other
S M D W # Single, Married, Divorced, or Widowed, and Number of Years
Child # Children and Number
B_____ Boys and Ages
G_____ Girls and Ages
Wk Place of Employment and Type of Work
P/L Position and Length of Employment
Sp Wk Spouse's Place of Employment
Ed Education: 1-12, College, Postgrad
Cnty Length of Residence in County
Home/O R Home Owner or Renter
Cr Prior Criminal Jury Experience
Chg Charge
F Foreperson
V Verdict
Cv Civil Jury Experience
PEx Personal Experiences with Violence or Crime
Vict/W Victim or Witness in a Criminal Case
Hby Hobbies
Org Organizations
Mil Military: Army, Navy, Air Force, Marines, or Coast Guard; Korea, Vietnam, Persian Gulf, Iraq, Afghanistan, Other
DA/Pol DA, Assistant DA, or Member of Police or Sheriff's Department Known by Juror
DA Rates Predicted DA Rating of Juror (1 = Lowest, 10 = Highest)
Remarks Juror's Dress, Body Language, Things Said, Other Important Details
Rating Defense Attorney's Rating of Juror (1 = Lowest, 10 = Highest)

Form 7.21B Jury Selection Form (CRM-0109)

N ______________________________
M F Y M O W B H O
S M D W # ________ Child # ________
B ______________ G ______________
Wk ______________________________
P/L ______________________________
Sp Wk ____________________________
Ed: 1-12 College Postgrad
Cnty ________________ Home O R
Cr ____________ Chg ____________
F V Cv
PEx ______________________________
Vict/W ___________________________
Hby ______________________________
Org ______________________________
Mil: A N AF M CG * K V PG I A O
DA/Pol ___________________________
DA Rates - 1 2 3 4 5 6 7 8 9 10 +
Remarks:

Rating: - 1 2 3 4 5 6 7 8 9 10 +

N ______________________________
M F Y M O W B H O
S M D W # ________ Child # ________
B ______________ G ______________
Wk ______________________________
P/L ______________________________
Sp Wk ____________________________
Ed: 1-12 College Postgrad
Cnty ________________ Home O R
Cr ____________ Chg ____________
F V Cv
PEx ______________________________
Vict/W ___________________________
Hby ______________________________
Org ______________________________
Mil: A N AF M CG * K V PG I A O
DA/Pol ___________________________
DA Rates - 1 2 3 4 5 6 7 8 9 10 +
Remarks

Rating: - 1 2 3 4 5 6 7 8 9 10 +

N ______________________________
M F Y M O W B H O
S M D W # ________ Child # ________
B ______________ G ______________
Wk ______________________________
P/L ______________________________
Sp Wk ____________________________
Ed: 1-12 College Postgrad
Cnty ________________Home O R
Cr ____________ Chg ____________
F V Cv
PEx ______________________________
Vict/W ___________________________
Hby ______________________________
Org ______________________________
Mil: A N AF M CG * K V PG I A O
DA/Pol ___________________________
DA Rates - 1 2 3 4 5 6 7 8 9 10 +
Remarks:

Rating: - 1 2 3 4 5 6 7 8 9 10 +

N ______________________________
M F Y M O W B H O
S M D W # ________ Child # ________
B ______________ G ______________
Wk ______________________________
P/L ______________________________
Sp Wk ____________________________
Ed: 1-12 College Postgrad
Cnty ________________ Home O R
Cr ____________ Chg ____________
F V Cv
PEx ______________________________
Vict/W ___________________________
Hby ______________________________
Org ______________________________
Mil: A N AF M CG * K V PG I A O
DA/Pol ___________________________
DA Rates - 1 2 3 4 5 6 7 8 9 10 +
Remarks

Rating: - 1 2 3 4 5 6 7 8 9 10 +

VII. Notes on Prosecutor's Opening/Closing [§ 7.22]

Commentary and Instructions for Form 7.22A

Form 7.22A Notes on Prosecutor's Opening/Closing (CRM-0110)

Form 7.22A, *infra*, is a record of the prosecutor's opening statement and closing argument. The left side of the form is for statements by the prosecutor and the right side is for defense counsel's ideas for rebuttal, objections, and other items. If the prosecutor makes an assertion during the opening statement but fails to prove the assertion during the trial, defense counsel can and should point out this discrepancy to the jury in the closing argument.

Whether to object to improper argument is a tactical decision; in a given situation, the defense attorney may decide that a wiser option is to respond during the defense argument or to avoid calling additional attention to the matter. The defense attorney should, however, be alert for such improper prosecutorial tactics as expressing a personal opinion of the defendant's guilt, *see State v. Jackson*, 2007 WI App 145, ¶ 22, 302 Wis. 2d 766, 735 N.W.2d 178, or making derogatory remarks about the role of the defense attorney, *see State v. Mayo*, 2007 WI 78, ¶ 42, 301 Wis. 2d 642, 734 N.W.2d 115. In addition, the defense attorney should be aware of the prosecution's propensity for vouching for a witness, which is prohibited. *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984); *see State v. Mader*, 2023 WI App 35, ¶ 35, 408 Wis. 2d 632, 933 N.W.2d 761 (citing *Haseltine*) (review denied).

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.22A Notes on Prosecutor's Opening/Closing (CRM-0110)

Client's Name *(3.01)* Case No. *(1.02)*

Prosecutor's Name *(4.01)* Page No. __________

Opening Statement

Statement Made	Notes

Client's Name *(3.01)* Case No. *(1.02)*

Prosecutor's Name *(4.01)* Page No. ______

Closing Argument

Statement Made	Notes

VIII. Notes on Witnesses [§ 7.23]

Commentary and Instructions for Form 7.23A

Form 7.23A Notes on Witnesses (CRM-0111)

Form 7.23A, *infra*, is for recording information about witnesses. The form could easily be converted to a computer database record. However, when in court, the lawyer probably will want printed records for use in examining the witnesses.

Most of the information needed to complete this form is self-explanatory. The field titled "Witness No." refers back to the number or letter assigned to the witness on the Trial Outline (*supra* Form 7.20A). The field titled "Factors Affecting the Witness's Credibility (Positive and Negative)" is where defense attorneys can record their predictions on what weight the jury will give the witness's testimony, based on the witness's role in the case, relationship to the alleged victim or other witnesses, prior criminal record, prior inconsistent statements, or other factors.

Although it is impossible to prepare for everything a witness might say, the defense attorney should try to anticipate the potentially harmful testimony of each witness. If evidence is clearly admissible, the defense strategy includes consideration of how to discredit or otherwise rebut it. If prejudicial evidence is arguably inadmissible (for example, as hearsay or evidence of the defendant's other acts), the attorney should research grounds for objection and should consider a pretrial motion in limine. *See supra* ch. 5.

> ***Practice Tip.*** A witness's bias against the defendant is highly relevant to that witness's credibility, and it is *never* a collateral issue. The defense can attempt to show bias both through cross-examination, *see State v. Yang*, 2006 WI App 48, ¶ 11, 290 Wis. 2d 235, 712 N.W.2d 400, and through relevant extrinsic evidence, *see State v. Missouri*, 2006 WI App 74, ¶¶ 15–25, 291 Wis. 2d 466, 714 N.W.2d 595 (holding that evidence from officer's other arrests was admissible to show possible bias and intent to frame defendant).

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.23A Notes on Witnesses (CRM-0111)

Client's Name ______________________ *(3.01)* ______________________

Case No. __________ *(1.02)* __________ Page No. ____________________

Witness's No. ____________________
Witness's Name ____
Home Address ____
Employer ____
Subpoenaed? Yes ☐ No ☐ Date Served ____________________
Date to Appear ____________________ Time ____________________
Written Statement? Yes ☐ No ☐ Signed: Yes ☐ No ☐
Deposition? Yes ☐ No ☐ Preliminary Testimony? Yes ☐ No ☐
Type of Witness: ☐ Eyewitness ☐ Expert ☐ Medical ☐ Psychiatrist
☐ Psychologist ☐ Police ☐ Victim ☐ At Scene ☐ Before or After
☐ Character ☐ Other ____

Factors Affecting the Witness's Credibility (Positive and Negative):

____

____

Summary of Strategy for Examining Witness:

____

____

Summary of Witness's Testimony:

____

____

____

____

Questions to Ask Witness:

____

____

____

____

Exhibits to Introduce Through This Witness:

____

____

Client's Name ______________________ *(3.01)* ______________________

Case No. __________ *(1.02)* __________ Page No. ____________________

Witness's No. ____________________

Witness's Name ____________________

Home Address ____________________

Employer ____________________

Subpoenaed? Yes ☐ No ☐ Date Served ____________________

Date to Appear ____________________ Time ____________________

Written Statement? Yes ☐ No ☐ Signed: Yes ☐ No ☐

Deposition? Yes ☐ No ☐ Preliminary Testimony? Yes ☐ No ☐

Type of Witness: ☐ Eyewitness ☐ Expert ☐ Medical ☐ Psychiatrist

☐ Psychologist ☐ Police ☐ Victim ☐ At Scene ☐ Before or After

☐ Character ☐ Other ____________________

Factors Affecting the Witness's Credibility (Positive and Negative):

____

____

Summary of Strategy for Examining Witness:

____

____

Summary of Witness's Testimony:

____

____

____

____

Questions to Ask Witness:

____

____

____

____

Exhibits to Introduce Through This Witness:

____

____

IX. Instructions for Witnesses [§ 7.24]

Commentary and Instructions for Forms 7.24A–7.24B

Form 7.24A	Instructions for Witnesses (CRM-0112)
Form 7.24B	Additional Instructions for the Defendant (CRM-0113)

Form 7.24A, *infra*, is a set of general instructions for all witnesses in a criminal case. Form 7.24B, *infra*, is a set of additional instructions for the defendant. The defendant should be familiar with the principles of both forms.

The instructions are intended only as a supplement to personal preparation of witnesses. There is no adequate substitute for interviewing and preparing witnesses on a one-to-one basis before trial. Trial simulations can be particularly helpful. A witness will be more at ease and the attorney more familiar with the witness if they have simulated the witness's testimony before trial.

All documents and instructions the witness uses in preparing to testify can be obtained by the prosecutor. Thus, if the defense attorney provides a copy of these instructions to a witness, the district attorney may obtain them and use them in an attempt to discredit the witness's testimony during cross-examination. Nothing in these instructions, however, is improper or illegal. In fact, there is much in the instructions that the defense could use to its advantage if the prosecutor chooses this course. For example, the instructions exhort the witness to tell the truth simply, without embellishment, and without trying to figure out whether the statement is likely to help or hurt the defense.

Distribution

Original:	Witness
Copy:	None

Notes

Form 7.24A Instructions for Witnesses (CRM-0112)

Instructions for Witnesses

You may already know that a witness in a criminal trial takes an oath to tell the truth. However, there are different ways to tell the truth. If you speak in a halting, stumbling, or hesitant manner, the jury may doubt that you are telling all of the facts truthfully. If you testify in a confident and straightforward manner, the jury is more likely to believe you. Be confident and straightforward. Tell the truth simply and without exaggeration.

You may be nervous when you are called to testify. To assist you, I have prepared a list of suggestions that should put you more at ease and make your testimony more effective.

1. If you witnessed a crime or some incident, try to visit the scene before the trial. View the scene from all angles and from where you were at the time of the incident, to become familiar with the scene. Close your eyes and try to picture the scene, the objects there, and the distances.

2. You may be asked questions about distances or time. If your answer is only an estimate, be sure to say so. Think about speeds, distances, and intervals of time before testifying. You may be asked questions such as the following: How long did the whole incident last? How far away were you? How far was person *A* from person *B*? What were the lighting conditions?

3. Before you testify, visit a court and listen to other witnesses testifying. This experience will familiarize you with a courtroom and court procedures.

4. Wear clean clothes to court. Dress conservatively.

5. Do not chew gum while testifying or taking the oath.

6. Stand up straight when taking the oath. Pay attention and say “I do” clearly and loudly enough for the judge and jury to hear.

7. Do not try to memorize what you are going to say. You will be asked questions about what you saw or what you already know. Thus, there is no need to worry about memorizing anything.

8. Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms, or any place in or around the courthouse. Otherwise, the jurors may accidentally observe you or overhear what you say. Jurors are only supposed to hear evidence from witnesses on the witness stand.

9. When you arrive at court on the day you are scheduled to testify, ask if there is an order excluding witnesses. This order is sometimes called a sequestration order. This order means that witnesses are not allowed to hear the testimony of other witnesses or to discuss testimony with other witnesses. This rule is intended to ensure that each witness’s testimony is based only on that witness’s memory and not on other witnesses’ testimony. If such an order is in effect, avoid talking about the case with anyone who might be a witness. This rule does not prevent you from talking with the lawyers in the case.
10. In a courtroom, a court reporter records everything that is said. The court reporter’s job is to make a permanent record of the case and the testimony. Speak out clearly. Do not nod your head “yes” or shake your head “no.” You can further help the court reporter by spelling names and describing

things or persons instead of pointing at them. The court reporter is taking everything down and must *hear* your answer.

11. While testifying, talk to the jury. Look at the jurors most of the time and speak to them frankly and openly as you would to any friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that the farthest juror can hear you easily.

12. Listen carefully to the question asked. Make sure the lawyer has finished the question before you begin your answer. If you do not understand the question, say so; ask that it be repeated, if necessary. Then give a thoughtful, considered answer. Do not let yourself be rushed into answering. If you do not know the answer, say so. Do not make up an answer.

13. Answer in your own words. If you cannot answer a question truthfully with a yes or no, you have a right to explain the answer.

14. Answer only the question asked and then stop talking and wait for the next question. Do not volunteer information.

15. If your answer was wrong, correct it immediately.

16. If your answer was not clear, clarify it immediately.

17. The court and the jury want only facts, not hearsay. Hearsay is what someone else told you. It is something you did not see or experience yourself. It is something about which you do not have any direct personal knowledge. Normally, you will not be allowed to testify about what someone else told you.

18. Avoid giving your opinions or conclusions. The jurors will draw their own conclusions from the facts. Stick to the facts. Do not guess.

19. Try to avoid overly broad statements such as “That’s all he said” or “Nothing else happened.” Instead, say “That’s all I can recall” or “To the best of my recollection” or “That’s all I remember happening.” Try to follow the old saying: “Never say never.”

20. Testifying can be tiring. Do not lose your temper. Remember that some attorneys or cross-examiners will try to wear you out until you lose your temper and say things that are incorrect or that will discredit your testimony.

21. Do not argue with the district attorney, the judge, or the defense attorney.

22. Always be polite.

23. You are sworn to tell the truth. Tell it. Do not stop to figure out whether your answer will help or hurt the party who called you as a witness.

24. Do not try to think back to what was said in a prior statement or in prior testimony. When you are asked a question, visualize what you actually saw, heard, or knew. Answer the question to the best of your ability.

25. Use your own words. Do not try to repeat technical or legalistic words unless you are comfortable using them. A juror will recognize words or phrases that are not your own. Do not step out of character. Be yourself.

26. Stop instantly when the judge interrupts you or when an attorney objects. Do not try to squeeze in your answer. The judge will let you know whether you should answer the question or not.

27. Do not exaggerate.

28. Give positive, definite answers whenever possible. Avoid saying “I think,” “I believe,” or “In my opinion.” If you do not know, say so. Do not make up your answer. You can be positive about the important things that you naturally would remember. If you are asked about little details that a person naturally would not remember, it is best to say that you do not remember. But try not to let the cross-examiner trap you into answering question after question with “I don’t know.”

29. Try not to act nervous. Avoid mannerisms that will make the jury think you are scared, not telling the truth, or not telling all you know. It is normal to feel nervous about testifying in court, but you should try to avoid being overcome by anxiety.

30. Do not look to an attorney or judge for help in answering a question. You are on your own. If the question is improper, an attorney will object. If the judge then tells you to answer, do so.

31. When you leave the witness stand, you may ask the court if you are free to leave or if you should remain in the courtroom. Do not approach counsel to begin a conversation or ask how you did.

32. There are several questions that are known as trick questions. If you answer them the way opposing counsel hopes you will, that attorney can make your answer sound bad to the jury. Here are three of those questions:

    a. “*Have you discussed your testimony in this case with the defendant’s lawyer?*” If you say no, the jury knows that is not true. Lawyers always talk to witnesses before they testify. If you say yes, the prosecutor may try to imply that the defense attorney told you what to say. Admit that you have discussed the facts of the case with the defendant’s lawyer, that he or she asked you about the facts, and that the attorney told you to tell the truth.

    b. “*Are you getting paid to testify in this case?*” The lawyer asking this question hopes you will answer yes so counsel can imply that you are being paid to say what the other side wants. Instead, you should give an answer such as the following: “No, I am not getting paid to testify. But I assume that I will be paid for my mileage and that I will receive the normal witness fee.”

    c. “*The defendant is a friend/relative of yours, isn’t he/she?*” The attorney is implying that you would lie for your friend or relative. You should answer this question with a simple and truthful yes or no. If the prosecutor asks this question, the defense attorney will later ask you if you are willing to commit perjury for the defendant. Your honest and forceful “no” will be all that the jury needs to hear to overcome any adverse implication in the original question.

33. Even if other witnesses’ testimony disagrees with yours, do not change your testimony. Testify to the truth as you know it.

Form 7.24B Additional Instructions for the Defendant (CRM-0113)

Instructions for the Defendant

As the defendant in a criminal case, you are the focus of attention. The judge and the jury will be watching you. Everything you say or do in the courtroom may affect the trial's outcome. Please observe the following guidelines at all times:

1. During the trial, and whenever the jury is present, try to avoid any but the briefest discussions with your attorney or anyone else in the courtroom. You will distract the attorney, the judge, and the jury. Furthermore, someone may overhear you. If you must communicate with your attorney, wait until a recess or write a note.

   Always be conscious of the jury. Even when you are not on the witness stand, the jurors will be watching you. The slightest thing you say or do may be interpreted as a sign of guilt. Your interests will be best served if you sit up straight and look keenly interested in the proceedings.

2. In even the most serious trials, there will likely be moments of humor in the courtroom. You will be less likeable to jurors if you sit through these moments stonefaced. Let the juror's reaction to events in the courtroom be your guide, but your reactions should always be far more restrained than the jurors'. If the jurors laugh out loud about something, you should smile to register your awareness of what is going on, but keep your reaction subdued compared to any other person in the courtroom.

3. We are often unaware of our facial expressions and body language. Stay fully alert to your own during the entire trial. From the moment you leave your home in the morning, you are on stage. We don't want to lose this case because of a road-rage confrontation with a juror on the way to the courthouse or because a juror sees you laugh outside the courthouse.

4. Jurors strongly dislike parties and courtroom spectators telegraphing their reactions to witness testimony or courtroom developments. Don't roll your eyes or shake your head in response to witness testimony. We'll have good moments in court; don't let on that you think you have something to celebrate. We'll have bad moments in court; don't let on that you think anything bad has happened.

5. Your attorney will provide you with a pen and a pad of paper on which you can make notes during the trial. Use this pad only for notes to your attorney. Do not doodle. Do not leave your notes for other people to read.

X. Subpoena and Certificate of Appearance with Cover Letter [§ 7.25]

Commentary and Instructions for Forms 7.25A–7.25C

Form 7.25A	Subpoena (CRM-0114)
Form 7.25B	Certificate of Appearance (Subpoena) (CRM-0115)
Form 7.25C	Subpoena Cover Letter (CRM-0116)

A *subpoena* is an order requiring a person to appear as a witness at a court hearing or to bring physical evidence (documents or objects) to a hearing. *See* Wis. Stat. §§ 885.02, 885.06(2). Although prosecutors and attorneys in civil cases are authorized to issue subpoenas, *see* Wis. Stat. §§ 885.01(2), 805.07(1), there is no statutory authority for defense attorneys to do so in criminal cases. Defense attorneys therefore commonly request subpoena forms from the clerk of court, pre-signed or pre-stamped by the clerk. *See* Wis. Stat. § 885.01(1) (clerk of court may sign and issue subpoena). Form 7.25A, *infra*, is the standard subpoena form. Form 7.25B, *infra*, is the standard certificate of appearance form.

This form and the commentary in this section apply to ensure the presence of lay witnesses who can be served in Wisconsin with a subpoena. Although some information in this section is pertinent to out-of-state witnesses, the formal procedure to compel their attendance is addressed in chapter 5, *supra*. The testimony of an expert witness is generally obtained after reaching an agreement with the expert regarding the compensation for work on the case. See chapter 10, *infra*, regarding approval from the State Public Defender (SPD) for expert services in SPD cases.

A subpoena is ordinarily served by personally delivering it to the named person (or, if the subpoena is for business records, on an authorized representative of the organization in question). *See* Wis. Stat. §§ 885.03, 801.11(5)(a). Substituted service of a subpoena is permissible when personal service has been unsuccessful; the subpoena may then be left with an adult at the same residence. *See* Wis. Stat. §§ 805.07(5), 801.11(1)(b).

The subpoena and certificate of appearance should be served with the cover letter in Form 7.25C, *supra*. The letter asks witnesses to assume that the judge will enter an order excluding and separating witnesses and preventing them from communicating with one another until they have been examined or until the trial or hearing is ended.

Defense attorneys usually rely on a defense investigator or the local sheriff to serve subpoenas for defense witnesses. *See* Wis. Stat. § 59.27(4) (duties of sheriff include service of legally authorized documents). The sheriff's office charges a fee for serving subpoenas, *see* Wis. Stat. § 814.70(1), unless the defendant is indigent, *see* Wis. Stat. § 885.10 (determination of eligibility by SPD is proof of "defendant's financial inability to procure the attendance of witnesses for his or her defense").

Witnesses appearing in court under subpoena are entitled to payment of a daily witness fee of $16.00 and mileage reimbursement. Wis. Stat. § 814.67(1)(am), (c). Witnesses who appear pursuant to subpoena should file a certificate with the county clerk documenting appearance and mileage. *See infra* Form 7.25B. Because of the low statutory amounts, some potential witnesses may be concerned about the financial impact of missing work, traveling to court, or both. Witnesses in criminal cases (for either party) are not entitled to prepayment of statutory fees or expenses. Wis. Stat. § 885.06(2). *But see* Wis. Stat. § 976.02(3)(b) (out-of-state witness, subpoenaed under Uniform Act for Extradition of Witnesses, must be tendered statutory fees).

Wis. Stat. § 885.09 authorizes the court to order payment to an out-of-state or indigent witness of "a specific reasonable sum for expenses and attendance, in lieu of fees." Although this statute refers exclusively to witnesses appearing on "behalf of the state," Wis. Stat. § 885.10 authorizes the judge to "direct the witnesses to be subpoenaed as he or she determines is proper and necessary" for an indigent defendant. Thus, when the statutory fees and expenses are insufficient to ensure a witness's appearance (or when prepayment is necessary), the defense attorney can seek court approval of reasonable witness expenses. These expenses could include the anticipated costs of transportation, lodging, and meals during the period that the witness will be required to be away from home.

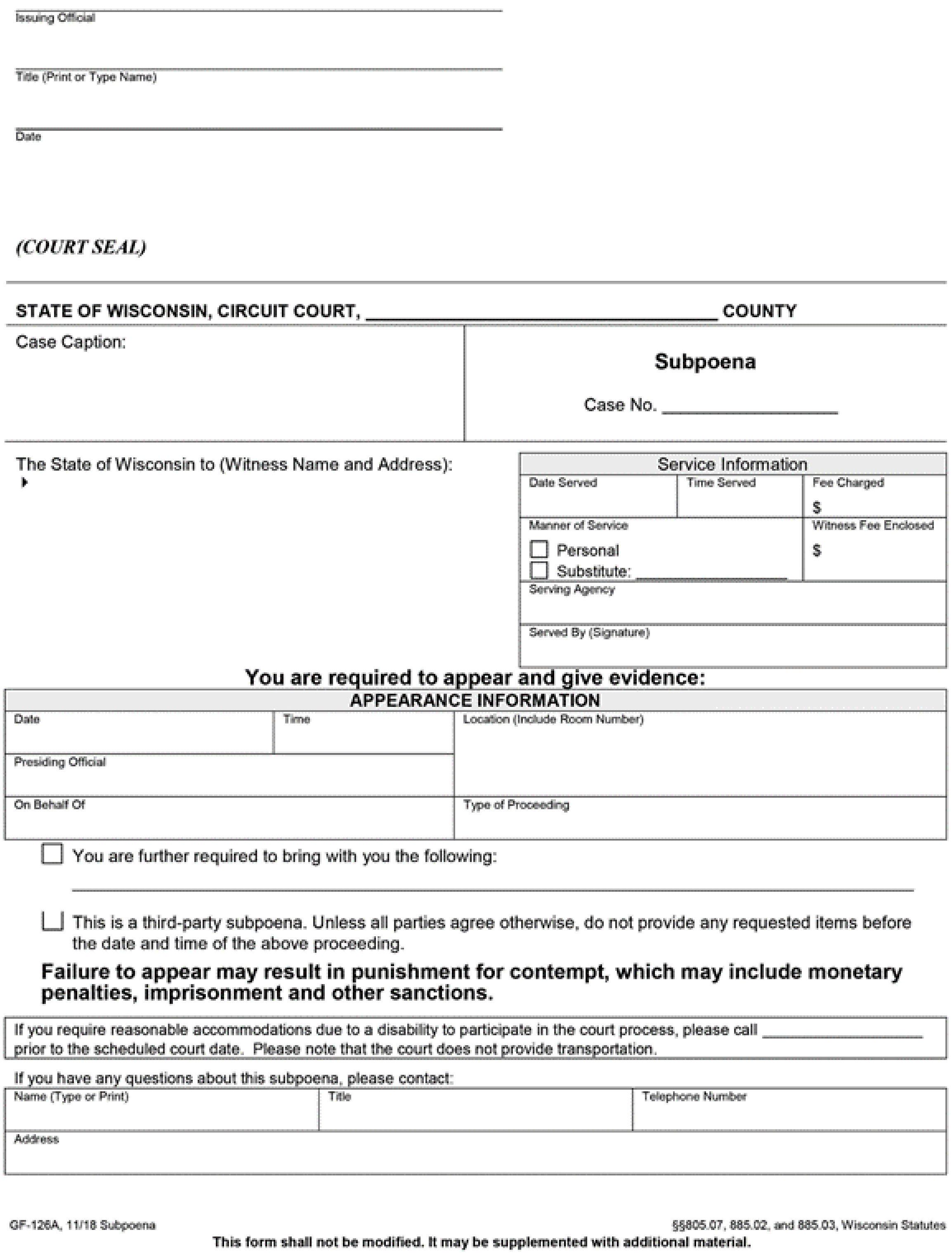
> ***Practice Tip.*** Defense attorneys do not always serve defense witnesses with subpoenas. Family members and close friends may appear voluntarily to testify. If, however, a witness unexpectedly fails to appear, the court is more likely to consider a request for adjournment or continuance if the witness has received a subpoena. Conversely, if the defense decided not to issue a subpoena, the court may decide that the defense effectively took the risk that the witness would decide not to appear. Some witnesses, although willing to appear voluntarily, may wish to be served with a subpoena (for example, to show to an employer or a teacher to explain an absence). Even if you expect the state to call a witness in its case in chief, and you need that witness's testimony, you must have the person under subpoena. If the state decides not to call that witness and you have not served the person with a subpoena, you will not be able to call that witness.

Distribution

Original:	Witness (or responsible adult at same address, for substituted service)
Copy:	File

Notes

Form 7.25A Subpoena (CRM-0114)



Issuing Official

Title (Print or Type Name)

Date

(COURT SEAL)

STATE OF WISCONSIN, CIRCUIT COURT, ______________________________ COUNTY

Case Caption:	**Subpoena** Case No. ________________

The State of Wisconsin to (Witness Name and Address):

Service Information		
Date Served	Time Served	Fee Charged $
Manner of Service ☐ Personal ☐ Substitute: ________________		Witness Fee Enclosed $
Serving Agency		
Served By (Signature)		

You are required to appear and give evidence:

APPEARANCE INFORMATION		
Date	Time	Location (Include Room Number)
Presiding Official		
On Behalf Of		Type of Proceeding

☐ You are further required to bring with you the following:

____

☐ This is a third-party subpoena. Unless all parties agree otherwise, do not provide any requested items before the date and time of the above proceeding.

Failure to appear may result in punishment for contempt, which may include monetary penalties, imprisonment and other sanctions.

If you require reasonable accommodations due to a disability to participate in the court process, please call __________________ prior to the scheduled court date. Please note that the court does not provide transportation.

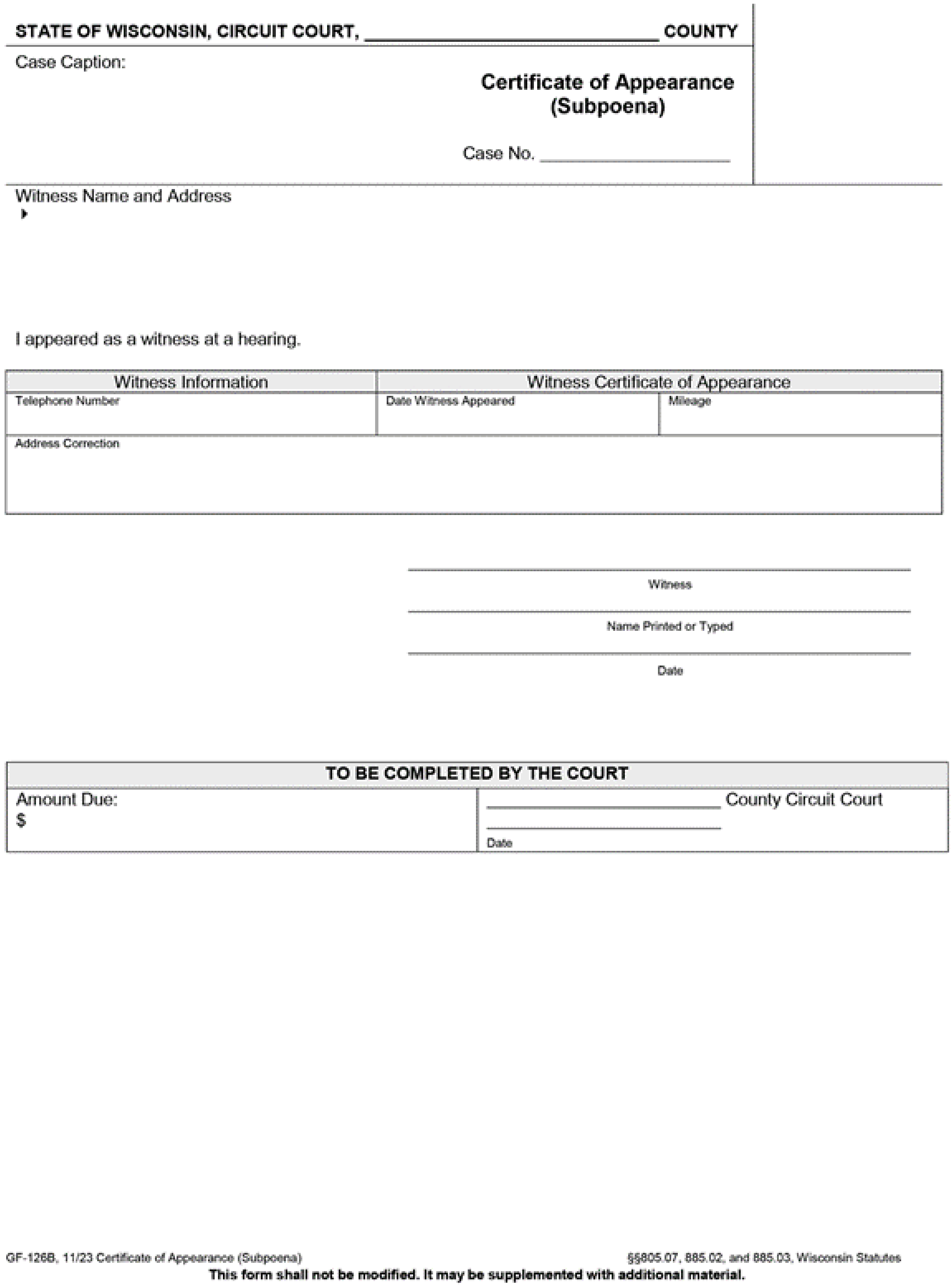
If you have any questions about this subpoena, please contact:

Name (Type or Print)	Title	Telephone Number
Address		

GF-126A, 11/18 Subpoena §§805.07, 885.02, and 885.03, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Form 7.25B Certificate of Appearance (Subpoena) (CRM-0115)



STATE OF WISCONSIN, CIRCUIT COURT, ______________________________ COUNTY

Case Caption:

Certificate of Appearance (Subpoena)

Case No. ____________________

Witness Name and Address
▸

I appeared as a witness at a hearing.

Witness Information	Witness Certificate of Appearance	
Telephone Number	Date Witness Appeared	Mileage
Address Correction		

____
Witness

____
Name Printed or Typed

____
Date

TO BE COMPLETED BY THE COURT	
Amount Due: $	________________________ County Circuit Court ________________________ Date

GF-126B, 11/23 Certificate of Appearance (Subpoena) §§805.07, 885.02, and 885.03, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Form 7.25C Subpoena Cover Letter (CRM-0116)

(Date)

(Witness Name)
(Witness Address)

Re: *State v.* _____________, Case No. (1.02)

Dear *(Witness's Name)*:

The trial in *(defendant's)* case has been set for *(list all dates of trial)*. It is not our intention that you spend the entire _____ days waiting at court to testify but, because we do not have control over the progress of the case, we must subpoena you for the entire trial. Please call *(name)* at *(phone number)* by *(date)* to make arrangements to receive updates as to the date and time you will be needed. If you do not contact our office to make these arrangements, the subpoena with which you have been served requires you to attend court on the dates and times indicated and wait to be called. A check for witness fees and mileage will be provided to you when you appear in court.

You may have already received a subpoena from the district attorney's office. You should understand that each subpoena is a separate legal requirement to come to court. The district attorney's office may decide not to call you as a witness and release you from the state's subpoena, but you will still be obligated by our subpoena to come to court.

Although we will do everything we can to minimize the time you spend at court, we hope you will understand that the progress of a trial is unpredictable and that some waiting is unavoidable.

It is probable that Judge ____ will order witnesses not to discuss the case with one another while waiting to testify. Please keep this in mind if you come to court while the trial is going on.

Sincerely,

(Name and address of Attorney)

XI. Exhibits [§ 7.26]

Commentary and Instructions for Form 7.26A

Form 7.26A Exhibits (CRM-0117)

During the course of a trial, when there are so many matters to attend to, it is easy to forget important details. The rules of evidence and the appellate courts are often unforgiving. Form 7.26A, *infra*, is designed to help the trial attorney keep track of exhibits during trial. The number or letter designation the court assigns to the exhibit goes in the first column ("Number"). A designation for the party offering the exhibit (e.g., "State" or "Def") goes in the second column ("Party"). A "Y" or "N" in the third column ("Rec'd") indicates whether the exhibit was offered and received into evidence. The fourth column ("Description and Notes") provides room to describe the exhibit and to note any comments or objections to the exhibit's being received, shown to the jury, or sent into the jury room.

Distribution

Original:	Trial notebook
Copy:	None

Notes

Form 7.26A Exhibits (CRM-0117)

Client's Name *(3.01)* Case No. *(1.02)*

Number	**Party**	**Rec'd**	**Description and Notes**

XII. Trial Motions Chart [§ 7.27]

Commentary and Instructions for Form 7.27A

Form 7.27A Trial Motions Chart (CRM-0118)

Form 7.27A, *infra*, is the place in the trial notebook where the trial lawyer keeps track of motions made during trial. The list can serve as a reminder to renew motions when necessary and is helpful for postverdict and appeal purposes. In the first column ("Nature of Motion"), the motion should be listed in shorthand (e.g., "M/Mistrial" for "Motion for a Mistrial"). The grounds for the motion should be noted in the second column (e.g., "Prosecutor's appeal to passion and prejudice in closing argument"). The notation "State" or "Def" in the third column ("By") indicates who made the motion. A "Y," "N," or "R" in the fourth column ("Granted") indicates whether the judge granted the motion, denied the motion, or reserved or held a ruling in abeyance.

Distribution

Original: Trial notebook
Copy: None

Notes

Form 7.27A Trial Motions Chart (CRM-0118)

Client's Name ______ *(3.01)* ______ Case No. ______ *(1.02)* ______

Nature of Motion	**Grounds**	**By**	**Granted**

XIII. Appealable Issues [§ 7.28]

Commentary and Instructions for Form 7.28A

Form 7.28A Appealable Issues (CRM-0119)

Form 7.28A, *infra*, is a record of potential grounds for appeal. These grounds might arise before or during trial. Following a long, hard-fought case, it is easy to forget some of the issues that might provide a basis for appellate relief. The defense attorney should take notes on these issues as they come up.

In general, failure to object at trial forfeits appellate review of a potential issue. *See State v. Ndina*, 2009 WI 21, ¶¶ 28–30, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining difference between knowing waiver and forfeiture by silence or inaction). By anticipating and preparing for potential objections, the defense attorney can respond quickly during trial to preserve issues for appeal.

For a discussion of appeal rights, see chapter 9, *infra*.

Distribution

Original: Trial notebook
Copy: None

Notes

Form 7.28A Appealable Issues (CRM-0119)

Client's Name *(3.01)* Case No. *(1.02)*

Number	**Grounds**

Chapter 8

Preparing for Sentencing

I. Introduction [§ 8.1]

Many defense attorneys make the mistake of assuming that there is little more they can do for a client after trial or after a plea bargain has been struck. Consequently, the attorney may make only perfunctory arguments on the client's behalf at sentencing, and the lead roles at the hearing may be played by persons not even in the courtroom—namely, the victim and the probation agent who prepared the presentence investigation (PSI) report.[1]

In reality, an effective defense strategy can make a critical difference at sentencing. The Quick Reference Guide to Sentencing and the Checklist of Defense Strategies at Sentencing, *infra* sections 8.3–.65 and 8.66, respectively, give the defense attorney a starting point for sentencing strategy. In devising this strategy, the attorney should take into consideration the client, the offense, the prosecutor, and the judge. The key question is: what is the best result that can be expected under the circumstances?

The defense attorney should keep in mind the following general goals when preparing for sentencing:

1. Avoiding incarceration;

2. If incarceration is inevitable, minimizing the term; and

3. If the sentence is confinement to a county jail or house of correction, obtaining work-release privileges.

The defense must also establish specific goals for each case. The attorney should consider carefully all available sentencing alternatives, including restitution, community service, probation, work release, and electronic monitoring. Even alternatives to a criminal conviction and sentence, such as deferred judgment, hold-open, and reduction of the charge to an ordinance violation should not be ruled out, although they are admittedly most appropriate in the context of plea negotiations. In most cases the judge has almost unlimited discretion at sentencing; nothing is final until the judge imposes the sentence and signs the judgment of conviction.

Also, the attorney should listen to the client's preferences and priorities regarding sentencing alternatives. Although many clients wish to minimize incarceration, others may be more concerned about monetary penalties, conditions of supervision, or collateral consequences.

The defense attorney should discuss the available sentencing alternatives with the client and be prepared to answer questions such as the following:

1. What is the attorney's realistic estimate of the likely sentence? If the client will be sentenced on more than one offense or if the client is already serving a sentence, might the sentence involve consecutive time? What is the difference between a consecutive and a concurrent sentence?

2. If the sentence involves probation, how long a probationary period should the client expect? Will the probation be conditioned on the client's spending some time in the county jail? What is it like to be on probation? How often must the client visit the probation officer? May the client leave the state while on probation? What other restrictions and conditions are likely to be imposed on the client during probation?

3. If the sentence involves incarceration, where will the client serve that sentence? If the sentence includes jail time, is the client eligible for release on electronic monitoring/GPS or for work release? If the sentence is to prison, what opportunities exist for release before serving the full term of incarceration? Is the client likely to be eligible for Challenge Incarceration Program (boot camp), Substance Abuse Program (earned release), or other sentence adjustment? What is extended supervision? What are the rules of extended supervision and the possible consequences of violating them?

4. What about restitution, fines, and costs?

5. What other consequences may occur because of the conviction or sentence? Will the client lose driving privileges? Will the client be disqualified from certain occupations or activities? If the client is not a U.S. citizen, will the conviction result in deportation?

The material in this chapter is intended to provide the criminal defense attorney with the necessary information to analyze, and, in some cases, the answers to, many of these questions. For those questions not answered directly, the chapter provides sources for those answers.

Sentencing is the most traumatic stage of the criminal case for the client. The conscientious defense attorney is well advised to devote time and energy to the client, as well as the client's case. Many clients and their families need more support at this stage than any other.

II. Checklist of Sentencing Motions and Other Materials (CRM-0120) [§ 8.2]

Note. The following checklist is a selective list of motions and other materials pertinent to sentencing in a criminal case. The checklist is not exhaustive and cannot substitute for the defense attorney's independent judgment. The range of possible motions is limited only by the attorney's imagination.

☐ Motion to Transfer Jurisdiction to Juvenile Court. Wis. Stat. § 938.183(1m).

☐ Motion for Supplemental PSI Report. Wis. Stat. § 972.15(1).

☐ Motion to Delete Material from PSI Report. Wis. Stat. § 972.15; *State v. Melton*, 2013 WI 65, 349 Wis. 2d 48.

☐ Motion for Disclosure of Sources of Information for PSI Report. Wis. Stat. § 972.15(2), (3); *State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749; *State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989).

☐ Motion for Division of Community Corrections File. *State v. Ruiz*, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); *Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84.

☐ Motion for Psychiatric or Psychological Evaluation (Competency). Wis. Stat. § 971.14(1r).

☐ Sample Letter (Memorandum) in Support of Sentencing Recommendation. *Infra* Form 8.67A; Wis. Stat. § 972.14(2).

☐ Motion for Sentence Credit. *Infra* Form 8.68A; Wis. Stat. § 973.155.

☐ Motion to Set or Revise Restitution. *Infra* Form 8.69A; Wis. Stat. §§ 973.09, 973.20.

☐ Motion to Expunge Record of Conviction. Wis. Stat. § 973.015.

☐ Motion to Remit Fines, Costs, Fees, and Surcharges. *Infra* Form 8.70A; Wis. Stat. §§ 973.05(3), 973.055(4), 973.06(2).

☐ Guilty Plea Questionnaire and Waiver of Rights (CR-227). *Infra* Form 8.71A.

☐ Notice of Right to Seek Postconviction Relief (CR-233). *Infra* Form 8.72A.

☐ Motion for Sentence Modification, Furlough, or Other Amendment to Judgment. Wis. Stat. §§ 972.13, 973.19.

☐ Motion for Release Pending Appeal. *Infra* Form 9.51A; Wis. Stat. §§ 809.31, 969.01(2).

III. Quick Reference Guide to Sentencing [§ 8.3]

A. Introduction [§ 8.4]

Upon conviction, the judge must impose sentence on the defendant. Sentencing alternatives available to the judge include the following:

1. Confinement, *see infra* §§ 8.7–.10, .14;
2. Fines, *see infra* § 8.41;
3. Probation, *see infra* § 8.9;
4. Restitution, *see infra* §§ 8.47–.56;
5. Work release or Huber law privileges, *see infra* § 8.57;
6. Special disposition, *see infra* §§ 8.38–.40;
7. Community service, *see infra* § 8.59; and
8. Electronic monitoring, *see infra* § 8.60.

The court has broad discretion regarding the appropriate sentence. *See, e.g.*, *State v. Grady*, 2007 WI 81, ¶¶ 31–32, 302 Wis. 2d 80, 734 N.W.2d 364. The defendant has a due process right to be sentenced on the basis of true and accurate information. *State v. Coulthard*, 171 Wis. 2d 573, 591, 492 N.W.2d 329 (Ct. App. 1992). Thus, an important role of the defense attorney is to ensure that inaccurate information does not harm the defendant at sentencing.

Prior convictions may result in an increase in the sentence imposed. *See* Wis. Stat. § 939.62; *see also infra* §§ 8.20–.24. The sentence imposed must, however, reflect credit for time already spent in custody in connection with the crime. Wis. Stat. § 973.155.

In felony cases, the judge may order a PSI after conviction. *See infra* § 8.6.

B. General Sentencing Principles [§ 8.5]

Sentencing decisions in Wisconsin involve the exercise of discretion, and on appeal, the reviewing court strongly presumes that the sentencing court has made a reasonable decision. *See, e.g.*, *State v. Gallion*, 2004 WI 42, ¶¶ 17–18, 270 Wis. 2d 535, 678 N.W.2d 197. The *Gallion* court reaffirmed two important principles of sentencing law: the requirement that the sentencing court articulate reasons for the sentence imposed and that the court should impose the minimum length of incarceration "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *Id.* ¶ 23 (quoting *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). The *Gallion* court also reaffirmed pertinent sentencing factors identified in earlier case law. *Id.* ¶ 43 & n.11.

The sentencing court must provide an explanation on the record of the reasons for its sentencing decision. Wis. Stat. § 973.017(10m)(a); *Gallion*, 2004 WI 42, ¶¶ 38–46. The weight that the court gives to each relevant factor is within the court's broad discretion. *See, e.g.*, *Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977); *State v. Stenzel*, 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20. Thus, if the circuit court provides reasons for its decision, citing relevant factors, an appellate court is highly unlikely to overturn a sentence as unduly harsh.

Wis. Stat. § 973.017 specifies additional sentencing factors for felony offenses committed on or after February 1, 2003 (this statute also applies to misdemeanor charges that could result in a bifurcated sentence). The sentencing court is specifically directed to consider protection of the public, the gravity of the offense, the offender's rehabilitative needs, and any applicable mitigating and aggravating factors. Wis. Stat. § 973.017(2). Wis. Stat. § 973.017 specifies several aggravating factors, some of which apply generally and some of which apply only to certain crimes. *See* Wis. Stat. § 973.017(3)–(8). There are no statutory mitigating factors.

Wisconsin does not presently have sentencing guidelines of statewide application. Each judicial district does, however, have guidelines for the offense of operating while intoxicated (OWI). *See* Wis. Stat. § 346.65(2m)(a); *see also Gallion*, 2004 WI 42, ¶¶ 47–48 (holding, in case decided before repeal of sentencing guidelines, that court must consider applicable guidelines); *State v. Jorgenson*, 2003 WI 105, ¶ 2, 264 Wis. 2d 157, 667 N.W.2d 318 (upholding consideration of district guidelines).

Practice Tip. Defense attorneys must be familiar with Wis. Stat. § 973.017 and with the case law setting forth general sentencing principles. Defense attorneys also need to tailor sentencing arguments to the preferences and concerns of the sentencing court. By knowing which factors the court considers most important regarding a specific offense, the defense attorney can anticipate and address these factors on the client's behalf. For example, if a judge places great importance on restitution for any financial loss, the defense attorney should let the client know the importance of paying restitution before sentencing. If the client has paid restitution, the defense attorney can emphasize that factor at sentencing.

C. Presentence Investigation and Report [§ 8.6]

In felony cases, the court may order a PSI after conviction. Wis. Stat. § 972.15(1). "The [PSI] is designed to assist the sentencing court in determining the appropriate sentence for that defendant and the public. Rational and consistent sentencing decisions cannot be achieved without a reliable information base. The [PSI] is supposed to provide the sentencing court with that information base." *State v. Taylor*, 2006 WI 22, ¶ 29, 289 Wis. 2d 34, 710 N.W.2d 466 (quoting *State v. Crowell*, 149 Wis. 2d 859, 868, 440 N.W.2d 352 (1989)). Appendix B (Pre-Sentence Investigation Recommendation Guidance to Agents of the Division of Community Corrections), *infra*, sets forth the risk-assessment instructions that the Department of Corrections (DOC) uses in preparing these reports.

Practice Tip. The defense attorney may want to prepare his or her own PSI report. A defense report may be helpful in any case in which a contested sentencing hearing is anticipated, regardless of whether the court has ordered a PSI. However, the defendant's statements, if included in a defense report, are admissible in a later trial. *State v. Greve*, 2004 WI 69, ¶¶ 2, 40, 272 Wis. 2d 444, 681 N.W.2d 479. Therefore, if the client is considering challenging the conviction and seeking a trial (or retrial), the defense attorney should ensure that no incriminating statements are included.

The person writing the court-ordered PSI report must try to contact the victim to determine the economic, physical, and psychological effect of the crime on the victim. Wis. Stat. § 972.15(2m). The PSI report writer also may ask any other appropriate person for information. *Id.*

If the defendant meets the statutory criteria of Wis. Stat. §§ 302.045(2)(b) and (c) for entry into the challenge incarceration program, the PSI report must include a recommendation regarding eligibility for that program. Wis. Stat. § 972.15(2c). If the defendant meets the statutory criteria of Wis. Stat. § 302.05(3)(a)1. for the earned release program, the PSI report must likewise include a recommendation regarding eligibility for that program. Wis. Stat. § 972.15(2b).

The judge must disclose the contents of the PSI report to the defense attorney and the district attorney before sentencing. The defendant is also entitled to read and review the PSI report before sentencing. Wis. Stat. § 972.15(2); *see State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989); *see also* Wis. JI—Criminal SM-34. Although a defendant cannot review and challenge how the COMPAS assessment tool calculates risk, he or she can review and challenge the resulting risk scores set forth in the COMPAS report attached to the PSI. *State v. Loomis*, 2016 WI 68, ¶¶ 53–56, 371 Wis. 2d 235, 881 N.W.2d 749.

D. Sentence Terms [§ 8.7]

1. In General [§ 8.8]

Wisconsin maintains a strong policy against interfering with the circuit court's discretion to impose a sentence within the dispositional or durational ranges established by the legislature for a given offense. *See, e.g.*, *State v. Taylor*, 2006 WI 22, ¶¶ 17–19, 289 Wis. 2d 34, 710 N.W.2d 466; *State v. Gallion*, 2004 WI 42, ¶¶ 17–18, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Young*, 2009 WI App 22, ¶ 23, 316 Wis. 2d 114, 762 N.W.2d 736.

Wis. Stat. § 939.60 defines a *felony* as a crime punishable by imprisonment in the Wisconsin state prisons; all other crimes are misdemeanors. All sentences to the Wisconsin state prisons must be for one year or more. Wis. Stat. § 973.15(1). Prison sentences are bifurcated, consisting of a term of confinement and a term of extended supervision. Wis. Stat. § 973.01(1); *see infra* § 8.14 (bifurcated sentences).

Wis. Stat. § 939.50 sets forth the general penalty classifications for felonies. Wis. Stat. § 939.51 sets forth the general penalty classifications for misdemeanors. Wis. Stat. § 939.61(2) limits penalties for crimes not specifically defined by the classification structure of Wis. Stat. §§ 939.50 and 939.51.

2. Probation [§ 8.9]

Although not technically considered a sentence, probation is a potential disposition in most criminal cases. *See* Wis. Stat. § 973.09(1).

A person placed on probation is supervised by the DOC "under conditions set by the court and rules and regulations established by" the DOC. Wis. Stat. § 973.10(1). The court may impose any reasonable and appropriate conditions of probation. Wis. Stat. § 973.09(1)(a). Permissible conditions of probation include the following:

1. Payment of attorney fees and costs, Wis. Stat. § 973.09(1g);

2. Confinement, not to exceed one year, Wis. Stat. § 973.09(4);

3. Community service work, Wis. Stat. § 973.09(7m)(a), *see infra* § 8.59;

4. For a sexual assault conviction, participation in a treatment program that requires the probationer to admit having committed the assault, *see State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998) (discussing conviction following *Alford* plea);

5. For a sexual assault conviction, receipt of advance approval from the probation agent before having an intimate relationship with a female, *see Krebs v. Schwartz*, 212 Wis. 2d 127, 568 N.W.2d 26 (Ct. App. 1997); and

6. For conviction of a "serious sex offense," lifetime supervision, Wis. Stat. § 939.615.

Restitution is also required as a condition of probation, unless the court finds substantial reason not to order it and states its reason on the record. Wis. Stat. § 973.09(1)(b); *see infra* §§ 8.47–.56.

For a conviction that carries a mandatory or presumptive minimum period of imprisonment of one year or less, the court may place the defendant on probation if the court requires, as a condition of probation, that the person be confined for at least that mandatory or presumptive period. Wis. Stat. § 973.09(1)(d). The court may not order the defendant to refuse participation in a home detention program as a condition of probation; doing so would interfere with the sheriff's authority to manage the county jail. *State v. Galecke*, 2005 WI App 172, ¶¶ 8, 9, 285 Wis. 2d 691, 702 N.W.2d 392.

For a felony conviction, the court may sentence a defendant to an original term of probation of not less than one year, nor more than either the statutory maximum original term of confinement or three years, whichever is greater. Wis. Stat. § 973.09(2)(b)1.; *State v. Stewart*, 2006 WI App 67, ¶¶ 5–8, 291 Wis. 2d 480, 713 N.W.2d 165. *But see* Wis. Stat. § 973.09(2)(b)2. (providing for longer term in the case of conviction for two or more crimes including at least one felony); *State v. Langham*, 2006 WI App 149, ¶ 3, 295 Wis. 2d 384, 720 N.W.2d 544 (holding that defendant convicted of three crimes could be sentenced to six years of probation under Wis. Stat. § 973.09(2)(b)2.). For specified misdemeanor convictions (including offenses involving either a firearm or domestic abuse), the court may sentence a defendant to an original term of probation of not less than six months nor more than two years. Wis. Stat. § 973.09(2)(a)1. For other misdemeanor convictions, the term of probation may not exceed one year. Wis. Stat. § 973.09(2)(a)1m., 1r. *But see* Wis. Stat. § 973.09(2)(a)2. (providing for longer term in the case of conviction for multiple misdemeanors). The court may not impose consecutive terms of probation. *State v. Schwebke*, 2001 WI App 99, ¶¶ 28–30, 242 Wis. 2d 585, 627 N.W.2d 313, *aff'd on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. *But see State v. Yakich*, 2022 WI 8, 400 Wis. 2d 549, 970 N.W.2d 12 (holding that a commitment, although not a sentence, refers to "maximum term of confinement" so that commitment periods are tied to traditional sentencing and therefore can be consecutive).

Despite the limits on the original term of probation, the court may extend probation for an unexcused failure to meet payment obligations (such as restitution and probation fees) or on the probationer's stipulation. *See* Wis. Stat. § 973.09(3). Extension may result in a total period of probation longer than the maximum imprisonment for the offense. *State v. Luu*, 2009 WI App 91, ¶¶ 1, 15, 319 Wis. 2d 778, 769 N.W.2d 125. The extension order must be made before the probation term has expired. *See* Wis. Stat. § 973.09(3)(a). If the person has made a good-faith effort to pay court-ordered obligations, the court should ordinarily order a civil judgment for the unpaid amount instead of extending probation. *See* Wis. Stat. § 973.09(3)(b).

When the probation period has expired, the probationer will be discharged and issued a certificate of discharge or final discharge, depending on whether the probationer is also on suspension for another felony at the time of discharge. Wis. Stat. § 973.09(5). A certificate of final discharge specifies the civil rights that have been restored, and those rights that have not been restored, to the probationer. *Id.* If the probationer was given the benefit of expungement under Wis. Stat. § 973.015(1m), the DOC will provide the discharge certificate to the court, "which shall have the effect of expunging the record." Wis. Stat. § 973.015(1m)(b); *cf. supra* § 8.34 (defense attorney should ensure that clerk of court promptly expunges records).

The DOC may petition the court to discharge a person from probation after the person has completed at least 50% of the probation term, satisfied all conditions of probation set by the court, satisfied all rules and conditions of probation set by the DOC, and fulfilled all financial obligations to the victim, the court, and the DOC, and if the person is not required to register as a sex offender under Wis. Stat. § 301.45. Wis. Stat § 973.09(3)(d)1.–6.

The DOC may initiate a proceeding to revoke probation if the person is alleged to have violated probation conditions (including DOC rules and regulations). *See* Wis. Stat. § 973.10(2). A revocation proceeding is an administrative proceeding before a hearing examiner in the Department of Administration's Division of Hearings and Appeals. *Id.*; *see also infra* § 8.64.

Even allegations of misconduct that do not result in revocation may result in temporary incarceration on a "probation hold." *See* Wis. Stat. § 973.155(1)(b) (recognizing time spent on probation hold as a basis for sentence credit); *see also* Wis. Admin. Code § DOC 328.27(2) (providing discretion for DOC to place a probationer in custody pending investigation of an alleged violation), (3) (specifying time limits for holds in the absence of a formal revocation hearing).

If probation is revoked, the formal sentence takes effect in one of two ways. If the court withheld sentence when placing the person on probation, the person is returned to court for sentencing. Wis. Stat. § 973.10(2)(a). If the court previously imposed and stayed a sentence, the person serves that sentence following revocation, without an additional sentencing hearing. *See* Wis. Stat. § 973.10(2)(b).

3. Concurrent and Consecutive Sentences [§ 8.10]

Concurrent sentences are sentences to two or more terms of imprisonment served simultaneously. *Concurrent sentences*, Black's Law Dictionary (11th ed. 2019). *Consecutive sentences* are two are more terms of imprisonment served in sequence. *Consecutive sentences*, *Black's Law Dictionary* (11th ed. 2019). All sentences in Wisconsin may be imposed either consecutively or concurrently, at the discretion of the trial judge. Wis. Stat. § 973.15(2), (2m); *see State v. Thums*, 2006 WI App 173, ¶ 14, 295 Wis. 2d 664, 721 N.W.2d 729; *cf. State v. Maron*, 214 Wis. 2d 384, 394, 571 N.W.2d 454 (Ct. App. 1997) (holding that sentence may not be consecutive to jail time imposed as a condition of probation). Absent a judicial or statutory declaration to the contrary, sentences are presumed to run concurrently. *State v. Oglesby*, 2006 WI App 95, ¶ 21, 292 Wis. 2d 716, 715 N.W.2d 727.

Terms of probation may be either concurrent with, or consecutive to, sentences on other charges. *See* Wis. Stat. § 973.09(1)(a). Terms of probation, however, may not be consecutive to one another. *State v. Schwebke*, 2001 WI App 99, ¶¶ 28–30, 242 Wis. 2d 585, 627 N.W.2d 313, *aff'd on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666; *see also State v. Yakich*, 2022 WI 8, 400 Wis. 2d 549, 970 N.W.2d 12 (distinguishing *Schwebke* and holding that circuit courts may impose consecutive periods of commitment for persons found not guilty by reason of mental disease or defect); *State v. Johnson*, 2005 WI App 202, ¶¶ 8, 20, 287

Wis. 2d 313, 704 N.W.2d 318 (holding that, when defendant is found guilty for separate offenses on different dates, court may impose consecutive periods of jail time as conditions of probation).

A Wisconsin sentence may be imposed, in whole or in part, concurrently with any sentence being served, or to be served, in any federal or state institution. *See* Wis. Stat. § 973.15(4).

4. Deferred Entry of Judgment; Stay of Execution [§ 8.11]

There is no statutory time limit for the court to enter judgment or to hold the sentencing hearing. *See* Wis. Stat. §§ 972.13(1), (2), 972.15. Thus, the court seems to have inherent authority and discretion to defer entry of judgment following, for example, the defendant's guilty or no contest plea. *See State v. Wollenberg*, 2004 WI App 20, ¶ 16 & n.6, 268 Wis. 2d 810, 674 N.W.2d 916. This deferment can be the basis for an agreement to dismiss or reduce a charge if the defendant satisfies certain conditions (e.g., completes a treatment program, pays restitution, completes probation on another case, or obtains driver's license).

Pursuant to Wis. Stat. § 973.15(8), a sentencing court may stay execution of a sentence of imprisonment as follows:

1. For legal cause, including the existence of a commitment pursuant to Wis. Stat. § 971.17; *State v. Szulczewski*, 216 Wis. 2d 495 (1998);
2. Under Wis. Stat. § 973.09(1)(a) (probation); or
3. For not more than 60 days (however, this basis for a stay is inapplicable for certain convictions of OWI).

If none of the above criteria are satisfied, the court may not grant a stay. Wis. Stat. § 973.15(8).

5. Lifetime Supervision of Serious Sex Offenders [§ 8.12]

Wis. Stat. § 939.615(2) provides that the court may, in addition to imposing sentence or placing the defendant on probation, order lifetime supervision by the DOC for those convicted of serious sex offenses. The offenses defined as serious sex offenses are listed in Wis. Stat. § 939.615(1)(b). The court may also order lifetime supervision in conjunction with a nonresponsibility finding (i.e., not guilty by reason of mental disease or defect) on a serious sex offense. Wis. Stat. § 939.615(2)(a).

6. Pardons and Other Forms of Executive Clemency [§ 8.13]

Wis. Const. art. V, § 6 vests in the governor the power to grant reprieves, commutations, and pardons after conviction for all offenses except treason and cases of impeachment. Pardons and other forms of executive clemency are governed by Wis. Stat. §§ 304.08–.12.

E. Bifurcated Prison Sentences and Procedures to Modify Bifurcated Sentence [§ 8.14]

For prison sentences other than those of life imprisonment, the court imposes a bifurcated sentence. Wis. Stat. § 973.01(1), (3). The bifurcated prison sentence is the central feature of Wisconsin's Truth in Sentencing Law, first enacted in 1997 Wisconsin Act 283, which overhauled the prior sentencing system of mandatory release and parole.

The first Truth in Sentencing Law (known as TIS I) governs felonies committed between December 31, 1999 and January 31, 2003. The current law, known as TIS II, retains bifurcated sentencing, but provides lesser penalties for many felony offenses committed on or after February 1, 2003. *See generally State v. Trujillo*, 2005 WI 45, ¶¶ 3–6, 279 Wis. 2d 712, 694 N.W.2d 933 (summarizing history of Truth in Sentencing legislation), *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶ 46–52, 333 Wis. 2d 53, 797 N.W.2d 828; *see also State v. Thums*, 2006 WI App 173, ¶ 10, 295 Wis. 2d 664, 721 N.W.2d 729 (holding that defendant could not be sentenced under TIS-I when all elements of the crime charged had not been committed before repeal of TIS-I).

A bifurcated sentence "consists of a term of confinement in prison followed by a term of extended supervision." Wis. Stat. § 973.01(2). The term of confinement may be not less than one year (unless a specific statute requires a greater minimum sentence for the offense) and not more than the maximum sentence provided for the applicable offense plus any applicable penalty enhancer. Wis. Stat. § 973.01(2)(b), (c).

The term of extended supervision must be at least 25% of the length of the term of confinement. Wis. Stat. § 973.01(2)(d). The maximum term ranges from two years (for a Class I felony) to 20 years (for a Class B felony). Wis. Stat. § 973.01(2)(d)(intro.), 1.–6. Penalty enhancers can extend the maximum term of confinement, subject to the 25% requirement for extended supervision, but do not increase the maximum period of extended supervision. *See* Wis. Stat. § 973.01(2)(c)1.

When a defendant is sentenced to life imprisonment, the court must also decide whether the defendant will be eligible for extended supervision. *See* Wis. Stat. § 973.014(1g)(a). Eligibility, if granted, begins after 20 years of imprisonment, at the earliest. Wis. Stat. § 973.014(1g)(a)1., 2. A defendant serving a life sentence who has been granted eligibility for extended supervision cannot file an initial petition for release to extended supervision more than 90 days before the extended supervision eligibility date. Wis. Stat. § 302.114(5)(a). The procedures the court must follow in considering the petition are set forth in Wis. Stat. § 302.114(5). Defendants sentenced to life imprisonment as persistent repeat offenders under Wis. Stat. § 939.62(2m)(c) are not eligible for release to extended supervision. Wis. Stat. § 973.014(1g)(a), (2); *see also* Wis. Stat. § 939.618(2)(b) (possible sentence of life without eligibility for release for second conviction under Wis. Stat. § 940.225(1)).

Violations of the rules of extended supervision can result in a confinement sanction of up to 90 days in jail. Wis. Stat. §§ 302.113(8m)(a), (b), 302.114(8m)(a), (b). In cases in which extended supervision is revoked, felony offenders not serving life sentences may be imprisoned for a term up to the remaining time on the bifurcated sentence. Wis. Stat. § 302.113(9)(am). If the extended supervision of a person serving a life sentence is revoked, the person must be returned to the circuit court of the county in which the person was convicted, and the court must order the person to be returned to prison for a specified period of time, not less than five years, before the person is eligible for rerelease to extended supervision. Wis. Stat. § 302.114(9)(am).

Although Wisconsin does not use the terms "good time" or "parole" in the context of bifurcated sentences, inmates may be eligible for release from prison before serving the entire term of confinement. The following programs and procedures offer the possibility of modifying a bifurcated sentence.

1. Challenge incarceration program: The program emphasizes manual labor, personal development counseling, substance-abuse treatment and education, military drill and ceremony, counseling, and physical exercise. Wis. Stat. § 302.045(1). The court decides whether a person who meets the statutory criteria (under age 40, Wis. Stat. § 302.045(2)(b), and not convicted of certain violent or assaultive offenses, Wis. Stat. § 302.045(2)(c)), is eligible for the challenge incarceration (also called boot camp) program. Wis. Stat. § 973.01(3m). The court also may specify when the person will become eligible. *State v. Lehman*, 2004 WI App 59, ¶ 19, 270 Wis. 2d 695, 677 N.W.2d 644.

   A judicial determination of eligibility does not ensure participation in the program, however; the DOC considers other statutory factors and has discretion in deciding whom to admit into the program. *See* Wis. Stat. § 302.045(1), (2). Successful completion of this program results in a reduction of the term of confinement (the court orders release within 30 days after receiving notice of successful completion) and an increase, by the same amount, in the term of extended supervision. Wis. Stat. § 302.045(3m).

2. Earned release program (referred to in the statutes as "Wisconsin substance abuse program"): The program is a treatment program. Wis. Stat. § 302.05(1). When imposing bifurcated sentences, the court decides whether a person who meets the statutory criterion (not convicted of certain violent or assaultive offenses, Wis. Stat. § 302.05(3)(a)1.) is eligible for the earned release program. Wis. Stat. § 973.01(3g). The court also may specify when the person will become eligible. *State v. White*, 2004 WI App 237, ¶ 2, 277 Wis. 2d 580, 690 N.W.2d 880.

   Successful completion of this program results in a reduction of the term of confinement (the court orders release within 30 days after receiving notice of successful completion) and an increase, by the same amount, in the term of extended supervision. Wis. Stat. § 302.05(3)(c)2.

3. Positive adjustment time (PAT): Created by 2009 Wisconsin Act 28, PAT was a mechanism to shorten the prison terms of persons convicted of certain offenses. *See* Wis. Stat. §§ 302.113(1), (2) (2007–08), 304.06(1)(bg) (2007–08), *as affected by*

2009 Wis. Act 28. PAT was repealed by 2011 Wisconsin Act 38, but the act provided a grandfather clause for inmates who earned PAT between October 1, 2009, and August 3, 2011. *See* Wis. Stat. § 973.198(1); 2011 Wis. Act 38, § 100.

4. New factor: A circuit court may modify a sentence on the basis of a new factor that was not known (either because it was not yet in existence or because the parties did not discover it) at the time of sentencing. *See, e.g.*, *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Although the case law on new-factor sentence modifications predates bifurcated sentencing, it applies to sentences under the bifurcated system as well as under the earlier sentence structure. *See State v. Crochiere*, 2004 WI 78, ¶ 26, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828; *State v. Klubertanz*, 2006 WI App 71, ¶ 38, 291 Wis. 2d 751, 713 N.W.2d 116 (holding that positive conduct in prison is not a "new factor").

   Note. The reduction in maximum penalties in 2001 Wisconsin Act 109 (TIS II) is not a new factor. *Trujillo*, 2005 WI 45, ¶¶ 1–2, 279 Wis. 2d 712.

5. Release because of age or extraordinary health condition: Wis. Stat. § 302.113(9g) provides an administrative process by which persons who have attained age 60 or who have an *extraordinary health condition* may seek early release from prison. An *extraordinary health condition* is "a condition afflicting a person such as advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution." Wis. Stat. § 302.113(9g)(a)1. Eligibility under this statute hinges on the person meeting at least one of the following three criteria:
   - Minimum age of 65 and has served at least 5 years of the term of confinement of the bifurcated sentence;
   - Minimum age of 60 and has served at least 10 years of the term of confinement of the bifurcated sentence; or
   - Extraordinary health condition (irrespective of age or prison time served).

   Wis. Stat. § 302.113(9g)(b).

   An inmate may seek sentence modification by submitting a petition to the program review committee (PRC) at the correctional institution in which the inmate is confined. Wis. Stat. § 302.113(9g)(c). When petitioning on the basis of an extraordinary health condition, the person must "attach to the petition affidavits from 2 physicians" diagnosing such condition. Wis. Stat. § 302.113(9g)(c).

   If the PRC determines that the public interest would be served by a modification of the inmate's sentence, the PRC notifies the DOC of its approval for modification, and the DOC refers the petition to the sentencing court for hearing. Wis. Stat. § 302.113(9g)(cm). After receiving notification from the DOC, the sentencing court must schedule a hearing to determine whether the public interest would be served by a modification of the inmate's sentence. Wis. Stat. § 302.113(9g)(d). The inmate, district attorney, and victim have the right to be present at the hearing and to provide a statement concerning sentence modification. *Id.* The inmate has the right to be represented by counsel in a proceeding under this statute. Wis. Stat. §§ 302.113(9g)(d), (j), 977.05(4)(jm). The petitioner has the burden of proving by the greater weight of the credible evidence that a modification "would serve the public interest." Wis. Stat. § 302.113(9g)(e).

   Sentence modification under this provision results in an increased term of extended supervision "so that the total length of a bifurcated sentence originally imposed does not change." Wis. Stat. § 302.113(9g)(f).

F. ABA Standards Relating to Sentencing [§ 8.15]

1. General Principles [§ 8.16]

In 1994, the ABA published the third edition of its Standards for Criminal Justice—Sentencing. The introduction advocates greater use of sentencing options other than imprisonment, noting that U.S. prison populations had tripled since 1975, giving the country the world's highest incarceration rate. *ABA Standards for Criminal Justice—Sentencing* xvii, xx (1994) [hereinafter *Standards for Criminal Justice—Sentencing*].

The ABA generally favors a system of presumptive sentencing guidelines, with judicial discretion to depart from the presumptive sentence because of mitigating or aggravating circumstances. *Id.* at xxi–xxv, § 18-3.1(a). The ABA states that appellate courts are responsible for enforcing the guideline criteria; therefore, the ABA recommends that either party may appeal a sentencing decision. *Id.* at xxviii, §§ 18-8.2, 8.3.

2. Severity of Sentencing [§ 8.17]

The current ABA standards adhere to the philosophy of imposing the least restrictive sentencing alternative, although the terminology has changed since the previous edition. *See Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-2.4, history. "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." *Id.* § 18-2.4.

"The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual that may be taken into account." *Id.* § 18-6.1(a). The Wisconsin Supreme Court has similarly stated that the sentence should recognize the minimum period of incarceration consistent with the need for public protection, the seriousness of the offense, and the offender's rehabilitative needs. *See, e.g.*, *State v. Gallion*, 2004 WI 42, ¶ 23, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Setagord*, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997).

"A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary." *Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-6.4(a). Standard 18-6.4(a) provides four situations in which the option of total imprisonment is appropriate: (1) the offender's causation or threat of great bodily harm; (2) the ineffectiveness of prior sanctions; (3) the severity of the offense, when lesser sanctions would foster disrespect for the law; or (4) the necessity to impress the offender with wrongfulness of conduct. *Id.* § 18-6.4(a)(i)–(iv). The 1970 version of this standard was adopted in *Bastian v. State*, 54 Wis. 2d 240, 247–48 & n.1, 194 N.W.2d 687 (1972).

"A legislature should not prescribe a minimum term of total confinement for any offense." *Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-3.21(b). Instead, sentencing guidelines should assist courts in determining when total confinement is the appropriate sentence. *Id.* § 18-3.21(c).

3. Alternatives to Incarceration [§ 8.18]

The ABA standards refer to alternative dispositions as "compliance programs." *See, e.g.*, *Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-3.13. "Sentence to a compliance program should be authorized as an appropriate sentence whether an offender has pled guilty, was convicted on plea of not guilty, or intends to appeal from conviction." *Id.* § 18-3.13(a). "Compliance programs, alone or in conjunction with other types of sanctions, are an appropriate type of sanction for all offenders." *Id.* § 18-3.12(b).

"[C]ompliance programs may include probation; parole; intensive supervision probation (ISP); drug, alcohol, sex-offender, psychiatric, and other treatment programs; family counseling; and vocational and educational training." *Id.* § 18-3.13, cmt. The standards also recommend the following sentencing options: restitution, fine, community service, public acknowledgment of guilt, intermittent confinement, and home detention. *Id.* §§ 18-3.15–18-3.20.

Consistent with the goal of imposing imprisonment in limited circumstances, Wisconsin case law has approved the ABA's recommendation that the court use alternatives, absent a finding that imprisonment is necessary. *See, e.g.*, *State v. Gallion*, 2004 WI 42, ¶ 25, 270 Wis. 2d 535, 678 N.W.2d 197; *Bastian v. State*, 54 Wis. 2d 240, 247–48, 194 N.W.2d 687 (1972) (approving *ABA Standards Relating to Probation* § 1.3 (Approved Draft, 1970)).

4. Consistency in Sentencing; Appellate Review [§ 8.19]

"Courts should give serious consideration to the goal of avoidance of unwarranted and inequitable disparities in sentences." *Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-6.1(b). To this end, meaningful appellate review should "develop a body of rational and just principles regarding sentences and sentencing procedures." *Id.* § 18-8.2(a)(iii). This body of sentencing law may reduce the pressure on circuit courts in highly publicized or emotional cases, because the court's sentences may be "seen to be less the personal choices of particular judges and more the embodiment of a set of general rules and procedures." *Id.* § 18-8.2, cmt.

Wisconsin's deferential standard of review and broad sentence ranges create a risk of unwarranted sentencing disparity. In *Gallion*, the Wisconsin Supreme Court reaffirmed the circuit court's broad discretion to weigh relevant factors in each case. *State v. Gallion*, 2004 WI 42, ¶¶ 17–18, 270 Wis. 2d 535, 678 N.W.2d 197; *see also State v. Taylor*, 2006 WI 22, ¶ 43, 289 Wis. 2d 34, 710 N.W.2d 466 (recognizing that weight to be given to specific factors is for circuit court to determine); *State v. Prineas*, 2009 WI App 28, ¶ 30, 316 Wis. 2d 414, 766 N.W.2d 206 (recognizing strong public policy against interference with circuit court's sentencing decision).

G. Prior Convictions [§ 8.20]

1. Persistent Repeater and Repeater [§ 8.21]

The terms *habitual criminality* and *repeater* are used interchangeably. *See* Wis. Stat. §§ 939.62, 973.12. The term *persistent repeater*, however, has a different meaning. Wis. Stat. § 939.62(2m)(b).

Wis. Stat. § 939.62(2m)(c) provides for mandatory life imprisonment, without eligibility for release on parole or extended supervision, for any defendant sentenced as a persistent repeater. A defendant with two or more prior convictions for *serious felonies*, as defined in Wis. Stat. § 939.62(2m)(a)2m., is potentially subject to persistent-repeater status if the prior convictions occurred on at least two separate occasions. Wis. Stat. § 939.62(2m)(b)1. At least one of the prior convictions must have occurred before commission of at least one of the other prior serious felonies resulting in a conviction. *Id.* Likewise, a defendant with at least one prior conviction for a *serious child sex offense*, as defined in Wis. Stat. § 939.62(2m)(a)1m., is subject to persistent-repeater status if convicted for a second serious child sex offense. Wis. Stat. § 939.62(2m)(b)2. The prior conviction must have occurred before the date of the offense for which the prosecution seeks a mandatory life sentence under this statute. *Id.*

Wis. Stat. § 939.62(2) defines *repeater* as a defendant who was convicted of a felony during the five-year period immediately preceding the commission of the crime for which he or she is presently being sentenced; or a defendant who has been convicted of misdemeanors on three separate occasions during the same five-year period. The convictions must be of record, unreversed, and unpardoned on the ground of innocence. Any time the defendant spent in actual confinement serving a criminal sentence is excluded in computing the preceding five-year period. Wis. Stat. § 939.62(2).

If the defendant is a repeater, the maximum term of imprisonment prescribed by law may be increased as follows:

1. Maximum terms of one year or less may be increased to not more than two years, and the sentence may be to a state prison. Wis. Stat. § 939.62(1)(a); *see* Wis. Stat. § 939.60; *see also* Wis. Stat. § 973.02.

2. Maximum terms of more than one year but not more than 10 years may be increased by not more than two years, if the prior convictions were for misdemeanors, and by not more than four years, if the prior conviction was for a felony. Wis. Stat. § 939.62(1)(b).

3. Maximum terms of more than 10 years may be increased by not more than two years, if the prior convictions were for misdemeanors, and by not more than six years, if the prior conviction was for a felony. Wis. Stat. § 939.62(1)(c).

The increased penalty does not change a misdemeanor into a felony. *State v. Watkins*, 40 Wis. 2d 398, 162 N.W.2d 48 (1968). The repeater charge only serves to increase the penalty; it is not a conviction for a separate crime. *See, e.g.*, *State v. Upchurch*, 101 Wis. 2d 329, 305 N.W.2d 57 (1981). Further, the repeater charge increases the potential term of confinement, but not the potential length of extended supervision. *State v. Jackson*, 2004 WI 29, ¶¶ 20–30, 270 Wis. 2d 113, 676 N.W.2d 872; *State v. Kleven*, 2005 WI App 66, ¶ 27, 280 Wis. 2d 468, 696 N.W.2d 226.

The court may impose a repeater sentence for each count of a multiple-count complaint, *Melby v. State*, 70 Wis. 2d 368, 234 N.W.2d 634 (1975), unless the present felony charge is for possession of certain substances, *see* Wis. Stat. § 961.48(5).

A court may not attach repeater allegations to convictions for escape under Wis. Stat. § 946.42, or for failure to report to jail under Wis. Stat. § 946.425. *See* Wis. Stat. § 939.62(1).

A separate repeater statute applies to most felony drug offenses when the defendant has previously been convicted of a felony or misdemeanor drug offense. Wis. Stat. § 961.48. (This enhancer does not apply when the present felony charge is for possession of certain substances, *see* Wis. Stat. § 961.48(5).) To invoke this provision, the district attorney must allege the repeat-offender status in the charging document. Wis. Stat. § 961.48(2m)(a). When properly invoked, the drug-repeater statute increases the maximum term of imprisonment by either four or six years, depending on the felony classification of the second (or subsequent) offense. Wis. Stat. § 961.48(1). The prosecutor can withdraw the repeater allegation (for example, as part of a plea negotiation) by filing an amended charging document. Wis. Stat. § 961.48(2m)(b).

Some statutes provide for increased penalties for second and subsequent convictions of the same offense. The most common examples are OWI and possession of marijuana. *See* Wis. Stat. §§ 346.65 (graduated penalties apply to OWI convictions), 961.41(3g)(e) (second or subsequent conviction for possession of marijuana is a felony; first offense is a misdemeanor).

The commission of certain crimes as a repeater may result in mandatory minimum sentences. For example, a repeater convicted of a firearm violation must receive a bifurcated sentence with the initial term of confinement of at least four years. Wis. Stat. § 939.6195(2).

2. Constitutional Issues [§ 8.22]

Generally, a defendant has a constitutional right to a jury determination, accompanied by the burden of proof beyond a reasonable doubt, of any fact that increases the maximum penalty. *Blakely v. Washington*, 542 U.S. 296, 301–04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). An exception has been recognized for prior convictions, however, which may be used to enhance a sentence without a jury determination. *See, e.g.*, *Blakely*, 542 U.S. at 301; *Apprendi*, 530 U.S. at 490; *State v. Matke*, 2005 WI App 4, ¶ 16 & n.7, 278 Wis. 2d 403, 692 N.W.2d 265. The *Apprendi* Court reasoned that, in the prior proceedings, the defendant "had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt." *Apprendi*, 530 U.S. at 496. The sentencing court, rather than a jury, may also make factual determinations "when the necessary information concerning the prior conviction can be readily determined from an existing judicial record." *State v. LaCount*, 2008 WI 59, ¶¶ 48–53, 310 Wis. 2d 85, 750 N.W.2d 780.

A more specific issue relates to Wisconsin's sentencing structure in OWI cases. *See* Wis. Stat. § 346.65(2). Wisconsin case law presently states that the number of prior OWI convictions is not an element of an OWI offense. "Prior OWI convictions are at most a 'status element' to be submitted to the sentencing judge after the verdict has been rendered.'" *State v. Verhagen*, 2013 WI App 16, ¶ 28, 346 Wis. 2d 196, 827 N.W.2d 891. Accordingly, the Wisconsin Supreme Court indirectly overruled those cases suggesting that a prior OWI conviction could be submitted to a jury in the absence of an admission. *See id.* ¶ 28 n.5. The number of convictions in existence at the time of sentencing, rather than at the time of the offense, determines the applicable range of penalties. *Matke*, 2005 WI App 4, ¶ 14, 278 Wis. 2d 403.

Because of the noncriminal status of most first-offense OWI cases, *see* Wis. Stat. § 346.65(2)(a) (forfeiture offense), the defense has a potential argument that a first-offense OWI should not be used to enhance the sentencing range. *But see* Wis. Stat. § 346.65(2)(f)1. (first-offense OWI is a crime if a passenger was under age 16). In the prior noncriminal proceeding, the defendant did not have the same jury-trial right or burden of proof as exists in criminal cases. *See* Wis. Stat. §§ 756.06(2)(c) (six-person jury in forfeiture case), 345.46 (five-sixths of jurors may agree to verdict), 346.45 (burden of proof is "clear, satisfactory and convincing").

3. Other Considerations [§ 8.23]

The court may not use matters that were dismissed and discharged under Wis. Stat. § 961.47 to enhance penalties. *See* Wis. Stat. § 961.47(1) (conditional discharge for possession or attempted possession of controlled substance as first offense). Likewise, the court may not validly consider convictions expunged under Wis. Stat. § 973.015. *See State v. Leitner*, 2002 WI 77, ¶ 2 n.3, 253 Wis. 2d 449, 646 N.W.2d 341; *infra* § 8.34. However, neither the district attorney nor law-enforcement agencies must expunge their records related to such a conviction. *Leitner*, 2002 WI 77, ¶ 3, 253 Wis. 2d 449. Also, the court may consider the facts related to the expunged offense. *Id.*

The prosecutor can present evidence to the court of prior crimes for the following purposes:

1. In a sentencing hearing, to argue that the defendant merits a severe sentence;

2. In a sentencing hearing or in response to a defense motion, to support an enhanced sentence, *see, e.g.*, Wis. Stat. §§ 939.62, 973.12, 961.48;

   Note. The state may not invoke both the general repeater statute and the drug-repeater statute for the same conviction. *See State v. Ray*, 166 Wis. 2d 855, 872–73, 481 N.W.2d 288 (Ct. App. 1992) (interpreting earlier versions of both repeater statutes). When the state has two prior convictions available, however, it may invoke both repeater provisions. *State v. Maxey*, 2003 WI App 94, ¶¶ 17–18, 264 Wis. 2d 878, 663 N.W.2d 811.

3. In a sentencing hearing or in response to a defense motion, to support a specific mandatory minimum term of incarceration for certain crimes, such as OWI, Wis. Stat. §§ 346.63(1), 346.65(2); *see State v. Wideman*, 206 Wis. 2d 91, 556 N.W.2d 737 (1996); and operating without a valid driver's license, Wis. Stat. § 343.05(5);

4. At trial, to prove an element of the offense when the existence of a prior conviction is part of the required proof, *see State v. Warbelton*, 2009 WI 6, ¶¶ 52–54, 315 Wis. 2d 253, 759 N.W.2d 557 (holding that evidence of prior conviction is admissible when such conviction is an element of present crime; noting, however, that if defendant stipulates to conviction, details of conviction are inadmissible);

5. At trial, to establish the applicable prohibited alcohol concentration under Wis. Stat. § 340.01(46m) when the defendant is subject to an ignition-interlock order or has three or more prior OWI convictions under Wis. Stat. § 343.307(1), if the defendant does not admit to the order or convictions, *see State v. Alexander*, 214 Wis. 2d 628, 644–45, 571 N.W.2d 661 (1997); or

   Note. If the lower alcohol concentration is alleged to apply because the defendant is subject to an ignition-interlock order, the prosecution probably will introduce evidence of the order. The underlying conviction (or refusal to submit to an alcohol test) might not be admissible unless the defense challenges the validity of the order.

6. At sentencing, to establish the cause of the underlying revocation in certain cases involving operation of a motor vehicle after license revocation, Wis. Stat. § 343.44(2)(b)4.

   Note. Many violations of Wis. Stat. § 343.44 are noncriminal forfeitures, but criminal penalties apply if the underlying revocation resulted from a violation of the OWI law or the implied-consent law. *See* Wis. Stat. § 343.44(2)(ar)2.

To invoke the enhanced penalty for a repeat offender, the prosecutor must either prove the prior conviction(s) or obtain the defendant's admission. *State v. Liebnitz*, 231 Wis. 2d 272, 284, 603 N.W.2d 208 (1999). The courts are reluctant to vacate enhanced sentences, however, on the basis of technical problems with the process of alleging and proving repeater status. *See, e.g.*, *State v. Saunders*, 2002 WI 107, ¶ 3, 255 Wis. 2d 589, 649 N.W.2d 263 (holding that certified copy of prior conviction is not required to prove repeater status); *Liebnitz*, 231 Wis. 2d at 287–88 (holding that, although defendant did not explicitly admit to prior conviction, no-contest plea encompassed all material facts in complaint, including repeater allegation); *see also State v. LaCount*, 2008 WI 59, ¶ 53, 310 Wis. 2d 85, 750 N.W.2d 780 (holding that court, rather than jury, could determine applicability of prior conviction to support repeater allegation when "the relevant information could be readily determined from a judicial record"); *State v. Fields*, 2001 WI App 297, ¶ 13, 249 Wis. 2d 292, 638 N.W.2d 897 (holding that state cured defect in pleading by correctly including penalty range in information and by introducing certified copies of prior convictions). *But see State v. Bonds*, 2006 WI 83, ¶¶ 45–49, 292 Wis. 2d 344, 717 N.W.2d 133 (holding that Consolidated Court Automation Program (CCAP) record was not sufficient proof of prior conviction for purposes of Wis. Stat. § 939.62).

4. Attacking the Use of Prior Convictions at Sentencing [§ 8.24]

A defendant may collaterally attack a prior conviction only if the defendant alleges a violation of the constitutional right to counsel. *State v. Peters*, 2001 WI 74, ¶¶ 14–15, 244 Wis. 2d 470, 628 N.W.2d 797; *State v. Hahn*, 2000 WI 118, ¶ 28, 238 Wis. 2d 889, 618 N.W.2d 528. To raise other challenges to the validity of a prior conviction, the defendant must seek to vacate that conviction and, if successful, seek a reduction of the enhanced sentence. *Hahn*, 2000 WI 118, ¶ 28, 238 Wis. 2d 889.

A court may not enhance a sentence by considering convictions obtained in violation of a defendant's constitutional right to counsel. *Burgett v. Texas*, 389 U.S. 109 (1967); *Hahn*, 2000 WI 118, ¶ 25.

The federal constitutional right to counsel applies in misdemeanor cases only if imprisonment is actually imposed. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *cf. Alabama v. Shelton*, 535 U.S. 654 (2002) (holding that right to counsel applies to suspended sentence in misdemeanor case that may result in later imprisonment). The Wisconsin Supreme Court has extended the right to counsel to all misdemeanor cases in which incarceration is a possible disposition. *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 550, 249 N.W.2d 791 (1977). *But cf. State v. Klessig*, 211 Wis. 2d 194, 202–03, 564 N.W.2d 716 (1997) (noting that state and federal rights are identical). The *Harris* court reasoned that the actual-imprisonment test is unworkable, because it requires the court to make a sentencing prediction before hearing the case. *Harris*, 75 Wis. 2d at 554–56.

Under federal law, however, the court may use a valid, uncounseled misdemeanor to enhance a later sentence. *Nichols v. United States*, 511 U.S. 738, 748 (1994). (*Nichols* has been distinguished by *State v. Forrett*, 2022 WI 37, ¶ 1, 401 Wis. 2d 678, 974 N.W.2d. 422, in which the Wisconsin Supreme Court held that counting a prior refusal toward the graduated penalty in the OWI guidelines is unconstitutional despite the refusal being a separate crime because counting the prior refusal "threatens with criminal penalties those who exercise their Fourth Amendment right to be free from unreasonable searches.") Thus, in collaterally attacking a misdemeanor conviction not resulting in imprisonment, the defense attorney should rely on the Wisconsin Constitution. *See* Wis. Const. art. I, § 7; *Harris*, 75 Wis. 2d at 550. An uncounseled forfeiture conviction, such as a first offense for OWI, may be used to enhance a later sentence. *State v. Novak*, 107 Wis. 2d 31, 33–34, 318 N.W.2d 364 (1982). *But see infra* § 8.23 (discussing possible challenge to this rule because of different jury-trial rights and burden of proof in forfeiture cases).

The procedure and standards for challenging an uncounseled conviction are set forth in *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92. The *Ernst* court reaffirmed the holding in *Klessig*, 211 Wis. 2d at 206, that before accepting a waiver of counsel, the circuit court must conduct a colloquy with the defendant. The colloquy must ensure that (1) the defendant voluntarily decided to proceed without counsel; (2) the defendant knew of the "difficulties and disadvantages" of proceeding pro se; (3) the defendant knew the seriousness of the charge(s); and (4) the defendant knew the general range of potential punishment. *Ernst*, 2005 WI 107, ¶ 14, 283 Wis. 2d 300; *Klessig*, 211 Wis. 2d at 206.

The *Ernst* court clarified, however, that the *Klessig* colloquy is not required by either the U.S. or Wisconsin Constitution. *Ernst*, 2005 WI 107, ¶¶ 2, 18, 283 Wis. 2d 300; *see also Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (Sixth Amendment does not require that colloquy include risk of overlooking viable defense or reference to independent opinion on wisdom of pleading guilty). Instead, the *Ernst* court upheld the *Klessig* colloquy under the Wisconsin Supreme Court's superintending authority to implement procedural court rules. *Ernst*, 2007 WI 107, ¶¶ 18–19, 283 Wis. 2d 300.

The source of the *Klessig* colloquy (as explained in *Ernst*) is important in the context of a collateral challenge to the use of a prior conviction. To bring a viable challenge, the defendant first must make a prima facie case that a constitutional violation occurred. *Id.* ¶ 25. Thus, the defendant must allege facts to show that he or she did not know or understand information critical to a valid waiver of the right to counsel. *Id.* It is not sufficient to allege that the colloquy was defective. *Id.*

If the defendant makes a prima facie case that the right to counsel was violated, the prosecutor has the burden of showing that the defendant had validly waived counsel at the earlier proceeding. *Id.* ¶ 27. Despite criticism of this procedure as placing the state "in an untenable position," *State v. Drexler*, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182, it provides the framework for a challenge to use of an uncounseled conviction for sentence enhancement. *But see State v. Clark*, 2022 WI 21, ¶ 20, 401 Wis. 2d 344, 972 N.W.2d 533 (stating that "if a defendant collaterally attacking a prior OWI/PAC conviction cannot point to a defect in the relevant transcript, the burden-shifting procedure does not apply. Instead, the defendant must carry the burden to demonstrate that a violation occurred.").

> ***Practice Tip.*** If the records in the earlier case assert that the defendant waived the right to an attorney, the defense attorney should request a transcript. The judgment may be inaccurate, or the waiver may have been defective. The attorney should also interview the defendant carefully regarding whether the defendant waived counsel in the previous case. The prosecution may call the defendant to testify as an adverse witness at an evidentiary hearing on the waiver issue. *Ernst*, 2005 WI 107, ¶ 2, 283 Wis. 2d 300.

A successful collateral attack in a sentencing proceeding constitutes a material breach of any plea agreement in the prior case. *State v. Deilke*, 2004 WI 104, ¶¶ 2, 24, 274 Wis. 2d 595, 682 N.W.2d 945. Thus, the state may vacate the agreement and reinstate the original charges from the prior case. *Id.* ¶¶ 2, 26. The defense attorney should review any plea agreements that resulted in the prior convictions and discuss with the defendant the possible risks of a successful collateral attack. The attorney needs to be familiar with the *Ernst* and *Deilke* cases regarding the procedures for and the consequences of collateral attacks on prior convictions.

Although the defense may raise its objection to a prior conviction during the sentencing hearing, compelling reasons often exist for challenging prior convictions before trial or the plea hearing. In some cases, a successful challenge may reduce a felony charge to a misdemeanor (for example, second-offense possession of marijuana). In some OWI cases involving a charge of prohibited alcohol concentration, the permissible alcohol level is affected by the number of prior OWI convictions or by the existence of an ignition-interlock order on the date of the alleged offense. *See* Wis. Stat. § 340.01(46m).

Practice Tip. Because of the passage of time between an alleged OWI incident and disposition of the charge, a defendant could be convicted in separate courts of two noncriminal OWI first-offense violations. In this situation, because the legislature has deemed the second violation a crime, a court commissioner has no jurisdiction to render a civil judgment and the conviction is void. *See County of Walworth v. Rohner*, 108 Wis. 2d 713, 717–19, 722, 324 N.W.2d 682 (1982). In contrast, when a circuit court enters a civil forfeiture judgment for a first-offense OWI that should have been criminally charged as a second-offense OWI, the court retains subject-matter jurisdiction over the matter, even though it lacks competency to treat a second offense as a first. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 1, 370 Wis. 2d 595, 882 N.W.2d 738. Unlike defects in subject-matter jurisdiction, challenges to circuit court competency may be forfeited if not raised during the original action. *Id.*

If the defendant has two first-offense OWI convictions of record, both of which the prosecution is relying on in a pending OWI (third or subsequent) case, the potential remedy is to vacate the void conviction, not to attack it collaterally in the pending OWI case. *See State v. Hammill*, 2006 WI App 128, ¶¶ 15–17, 293 Wis. 2d 654, 718 N.W.2d 747. Defense counsel should be aware, however, that depending on the availability of evidence and the elapsed time since the prior OWI incident, the prosecutor could recharge the prior offense as a second-offense OWI. *See Rohner*, 108 Wis. 2d at 722 (noting that, following dismissal of forfeiture complaint for lack of jurisdiction, prosecutor has option of filing criminal complaint). If the two first-offense convictions both occurred many years ago, with several years in between them, the prior law on counting OWI convictions may have precluded charging the second one as a crime. *See, e.g.*, 1997 Wis. Act 237, § 527yg (amending look-back period for second-offense OWI from 5 years to 10 years).

H. Sentence Credit [§ 8.25]

1. Definitions [§ 8.26]

Wis. Stat. § 973.155 is the governing statute for granting credits toward sentences in Wisconsin. Pursuant to this section, a convicted offender is entitled to sentence credit for all actual days spent in custody in connection with the course of conduct for which the sentence was imposed. Wis. Stat. § 973.155(1)(a). *Actual days spent in custody* includes, without limitation, confinement related to an offense for which the offender is ultimately sentenced or for any other sentence “arising out of the same course of conduct.” *Id.*

The sentence-credit statute does not define *custody*. *See* Wis. Stat. § 973.155. The courts have stated, however, that a defendant’s “status constitutes custody whenever the [defendant] is subject to an escape charge for leaving that status.” *State v. Magnuson*, 2000 WI 19, ¶ 31, 233 Wis. 2d 40, 606 N.W.2d 536; *see also State v. Johnson*, 2007 WI 107, ¶ 31, 304 Wis. 2d 318, 735 N.W.2d 505.

The criminal escape statute, Wis. Stat. § 946.42(1)(a), defines custody to include confinement in adult and juvenile correctional facilities. A person in the actual custody of an officer (e.g., under arrest) is in custody under the statute. *Id.* Supervision in the community (e.g., as a result of extended supervision) does not constitute custody. *Id.* Custody does not include the constructive custody of a juvenile who has been released to community supervision under Wis. Stat. ch. 938. Wis. Stat. § 946.42(1)(a)2. Other statutes defining correctional programs contain specific cross-references to possible prosecution for escape. *See, e.g.*, Wis. Stat. §§ 301.046(6) (community residential confinement), 301.048(5) (intensive sanctions), 302.425(6) (home detention and electronic monitoring, when placement made by county sheriff or DOC), 303.065(2) (escape from work-release program). Conversely, the risk of prosecution for bail jumping is insufficient to entitle a defendant to credit for time during which he or she is subject to the restrictive conditions of release on bond. *Magnuson*, 2000 WI 19, ¶¶ 37–38, 233 Wis. 2d 40. Thus, the type of community-based placement or restriction is often less important than the agency that imposed it and the consequences for leaving the place in question prematurely.

2. Calculating Sentence Credit [§ 8.27]

Time for which a convicted offender is entitled to credit includes the following:

1. All days spent in a juvenile detention facility before waiver to adult court, *see* Wis. Stat. § 973.155(1)(a); *State v. Baker*, 179 Wis. 2d 655, 659, 508 N.W.2d 40 (Ct. App. 1993);

2. All days spent in a city or county jail before bail is set, *see id.*; Wis. JI—Criminal SM-34A;

3. All days spent in a county jail while unable to make bail, *see* Wis. Stat. § 973.155(1)(a); Wis. JI—Criminal SM-34A;

4. All days spent in a county jail during nonworking hours as a condition of bail or probation, *State v. Gilbert*, 115 Wis. 2d 371, 340 N.W.2d 511 (1983), *modified on other grounds by State v. Magnuson*, 2000 WI 19, ¶ 26, 233 Wis. 2d 40, 606 N.W.2d 536;

5. All days spent in a jail or locked hospital facility pending a determination of competency under Wis. Stat. § 971.14(2), or committed as not competent to stand trial under Wis. Stat. § 971.14(5), *see* Wis. Stat. § 973.155(1)(a); Wis. JI—Criminal SM-34A;

6. All days incarcerated in another state when that detention is in connection with the course of conduct for which the Wisconsin sentence is imposed, *State v. Carter*, 2010 WI 77, ¶¶ 57–63, 327 Wis. 2d 1, 785 N.W.2d 516;

7. When concurrent sentences are imposed, all days spent in custody in connection with the pertinent conduct until the defendant begins serving one of the sentences (credit may be applied to all concurrent sentences), *see* Wis. JI—Criminal SM-34A; *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988); *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989); *see also infra* § 8.30. *But cf. State v. Johnson*, 2009 WI 57, ¶¶ 3, 76, 318 Wis. 2d 21, 767 N.W.2d 207 (holding that defendant is not necessarily entitled to same amount of credit on concurrent sentences; court must review separately the conduct giving rise to each sentence to determine whether custody was "in connection with" that conduct);

8. All days spent in custody on charges that are dismissed and considered as read-in offenses at sentencing, *State v. Floyd*, 2000 WI 14, ¶ 32, 232 Wis. 2d 767, 606 N.W.2d 155, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, ¶ 89, 310 Wis. 2d 259, 934 N.W.2d 905;

9. When probation is revoked, all days spent in custody as a condition of probation, *Gilbert*, 115 Wis. 2d at 377; *State v. Yanick*, 2007 WI App 30, ¶¶ 1, 24, 299 Wis. 2d 456, 728 N.W.2d 365, and all days spent in custody on a probation hold, Wis. Stat. § 304.072(1), (4), (5); *State v. Beets*, 124 Wis. 2d 372, 381–82, 369 N.W.2d 382 (1985);

10. All days the defendant is "in custody" in connection with a course of conduct for which sentence is imposed, looking to whether defendant is subject to an escape charge for leaving the defendant's status, with reference to escape statute or other governing statutes, *State v. Friedlander*, 2019 WI 22, 385 Wis. 2d 633, 923 N.W.2d 849; and

11. Despite a signature bond, time incarcerated on a hold (for violating conditions of extended supervision) that was partially caused by the conduct underlying the new conviction, *State v. Hintz*, 2007 WI App 113, ¶ 11, 300 Wis. 2d 583, 731 N.W.2d 646.

Despite the general right to receive sentence credit in the above-listed circumstances, the existence of multiple sentences or charges may negate the right to credit in a specific case (see examples below and sections 8.28–.30, *infra*).

Time for which a convicted offender is not entitled to credit includes the following:

1. When a concurrent sentence is later imposed for a separate and unrelated offense, time spent between the two sentencing hearings, *see* Wis. JI—Criminal SM-34A; *Beets*, 124 Wis. 2d at 379–81; *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984); *see also infra* § 8.29;

2. When a consecutive sentence is imposed for a second offense, time spent in custody for which credit was given on the sentence for the first offense, *see* Wis. JI—Criminal SM-34A; *Boettcher*, 144 Wis. 2d 86; *State v. Coles*, 208 Wis. 2d 328, 559 N.W.2d 599 (Ct. App. 1997); *see also infra* § 8.30;

3. Time served in another state after sentencing for an offense committed in that state, even if a Wisconsin detainer or warrant has also been filed, *see Carter*, 2010 WI 77, ¶¶ 7, 37, 327 Wis. 2d 1;

   Practice Tip. When a defendant is incarcerated in another state and a Wisconsin hold is lodged against him or her, the defendant should consider aggressively pursuing early resolution of the hold. *See generally* Wis. Stat. § 976.05 (Uniform Act on Detainers). Absent countervailing considerations, the defense attorney should submit written materials such as demands for a speedy trial and expressions of a willingness to waive extradition. An aggressive approach to resolution of the hold may result in a more fruitful request for credit. *See Carter*, 2010 WI 77, ¶¶ 74–75, 327 Wis. 2d 1 (noting that defendant, pursuant to Uniform Act, resolved Wisconsin case and received sentence to run concurrent with out-of-state sentence).

4. Time spent on electronic monitoring or in home detention as a condition of release on bond, *Magnuson*, 2000 WI 19, ¶ 48, 233 Wis. 2d 40; *State v. Pettis*, 149 Wis. 2d 207, 441 N.W.2d 247 (Ct. App. 1987). Time spent in this type of program after sentencing, however, results in sentence credit. *See* Wis. Stat. § 973.03(4)(b) (discussed in section 8.60, *infra*);

5. Time served on electronic monitoring or in home detention as a court-ordered condition of probation, *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶¶ 34–35, 250 Wis. 2d 214, 640 N.W.2d 527;

6. Time served as a DOC sanction or as condition of probation on a different case from the one on which the sentence credit is sought, *State v. Abbott*, 207 Wis. 2d 624, 558 N.W.2d 927 (Ct. App. 1996); *State v. Riley*, 175 Wis. 2d 214, 498 N.W.2d 884 (Ct. App. 1993). *But see Yanick*, 2007 WI App 30, ¶ 24, 299 Wis. 2d 456 (holding that after defendant's probation was revoked, he was entitled to credit for time served as a condition of probation, despite having spent part of that time also serving an unrelated prison sentence); and

7. Time served in a juvenile correctional institution while awaiting trial on an adult charge, if the defendant would have been confined in the juvenile institution regardless of the alleged conduct in the adult case, *see State v. Johnson*, 2007 WI 107, ¶¶ 38–79, 304 Wis. 2d 318, 735 N.W.2d 505. *But cf. State v. Thompson*, 225 Wis. 2d 578, 584–86, 593 N.W.2d 875 (Ct. App. 1999) (awarding credit for time in juvenile institution when new crime resulted in revocation of aftercare supervision).

3. Application of Sentence Credit to Consecutive and Concurrent Sentences [§ 8.28]

a. Concurrent Sentences [§ 8.29]

When the defendant was in custody on multiple charges, time spent in custody up to the time the defendant begins serving one of the sentences may be credited to all concurrent sentences for those charges. Wis. JI—Criminal SM-34A; *see State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988); *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989). Otherwise, the defendant would not receive the full benefit of having the sentences run concurrently. For each sentence, however, the custody must have been "in connection with" the conduct giving rise to the sentence. *State v. Johnson*, 2009 WI 57, ¶¶ 3, 76, 318 Wis. 2d 21, 767 N.W.2d 207. Therefore, the amount of credit awarded may differ among multiple concurrent sentences.

Time spent in custody between revocation of extended supervision and the commencement of the sentence revocation is credited both to reconfinement after revocation and to a sentence on a new charge ordered to run concurrently with the reconfinement time. *State v. Antone*, No. 2009AP860-CR, 2009 WL 2750465 (Wis. Ct. App. Sept. 1, 2009) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (noting that sentence after revocation of parole or extended supervision begins when a person arrives at prison, per Wis. Stat. § 304.072(4)); *State v. Odom*, 2006 WI App 145, ¶ 34, 294 Wis. 2d 844, 720 N.W.2d 695; *State v. Presley*, 2006 WI App 82, ¶ 15, 292 Wis. 2d 734, 715 N.W.2d 713.

Time spent serving a sentence for one offense is not credited to a later sentence for an unrelated offense to be served concurrently with the first. Wis. JI—Criminal SM-34A; *see State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985); *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984).

b. Consecutive Sentences [§ 8.30]

With consecutive sentences, credit for time spent in custody is awarded against only one of the sentences. Wis. JI—Criminal SM-34A; *see State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988).

> ***Practice Tip.*** Local practice may not include intense scrutiny of the complex case law regarding sentence credit. Jail overcrowding, the ability to recommend or impose judgments for periods of incarceration, and other factors may assist defense counsel in obtaining jail credit in situations in which the full amount of credit could arguably be denied. Thus, the defense attorney should ordinarily seek credit for all time served in connection with the offense in question, recognizing, and advising the client of, the possibility that credit may be denied under some circumstances.

4. Credit on Jail Sentences for Good Time [§ 8.31]

Wis. Stat. § 302.43 provides that, subject to narrow exceptions, inmates of county jails may reduce their jail sentences by one-fourth by earning good time. The credit for good time applies to time served before sentencing, as well as to time served after the court imposes the sentence. *See* Wis. Stat. § 302.43. County jail inmates, including those sentenced to jail as a condition of probation, are eligible for good-time credit. *See State ex rel. Baade v. Hayes*, 2015 WI App 71, 365 Wis. 2d 174, 870 N.W.2d 478. Also, eligibility for good time is mandatory when the probationary term is for an offense that carries a mandatory or presumptive minimum period of incarceration, which the court imposes as a condition of probation. *See* Wis. Stat. § 973.09(1)(d).

I. Court and Law-Enforcement Records [§ 8.32]

1. Public Records in General [§ 8.33]

Many clients are rightly concerned that a public record of the charges against them may damage their reputations. Prospective employers, for example, may be reluctant to hire an individual who has been charged with a crime, even if the charge was ultimately dismissed. Statewide court records are readily available through Wisconsin Court System Circuit Court Access (CCAP, accessible online at https://wcca.wicourts.gov/), causing anxiety about their public nature. *See* Wis. Stat. § 758.19(4) (authority for circuit court automated information systems).

The most critical public records related to a criminal charge are court records and arrest records. Court records of adult criminal proceedings are generally available to the public. *See* Wis. Stat. § 19.35(1) (public records law provides that, subject to exceptions, the public may inspect records maintained by public agencies). SCR 72.06, however, provides that "[w]hen required by statute or court order," the clerk of court shall remove, or *expunge*, identifying information about a case, in both paper and electronic format, from public access.

Persons convicted of specified criminal offenses are subject to registration requirements under Wis. Stat. § 301.45. The public has access to information regarding registrants through a DOC website, *Wisconsin Department of Corrections Sex Offender Registry*, https://appsdoc.wi.gov/public (last visited Oct. 31, 2022).

Registration is mandatory following conviction for specified sexual offenses, Wis. Stat. § 973.048(2m), and discretionary for other specified offenses if the court determines that the conduct was sexually motivated and that registration would protect the public, Wis. Stat. § 973.048(1m). If the defendant had not attained age 19 at the time of certain offenses and was within four years of the age of the child victim, the court has discretion to exempt the defendant from the otherwise-mandatory registration requirement. *See* Wis. Stat. §§ 973.048(2m), 301.45(1m).

2. Expungement of Conviction Record [§ 8.34]

Wis. Stat. § 973.015 provides for possible expungement of a defendant's record upon successful completion of a sentence after a conviction for certain offenses. To *expunge* means to strike or obliterate from the record all references to the defendant's name and identity. 67 Wis. Op. Att'y Gen. 301 (1978). When the court orders expungement under Wis. Stat. § 973.015, the defendant is entitled to have the paper and electronic court records removed, thus precluding public access.

Generally, the circuit court has discretion regarding the decision to allow expungement. *See* Wis. Stat. § 973.015(1m)(a)1. For certain offenses under Wis. Stat. § 942.08 (invasion of privacy), however, expungement is mandatory for defendants who committed the offense before attaining age 18 and who successfully complete their sentences. Wis. Stat. § 973.015(1m)(a)2. For other offenses, the defendant must be under the age of 25 at the time the offense was committed and the conviction must be for a crime carrying a maximum period of imprisonment of six years or less. Wis. Stat. § 973.015(1m)(a)1. Additional exceptions to eligibility for expungement of felonies are set forth in Wis. Stat. § 973.015(1m)(a)3. The court must make specific findings that the defendant will benefit, and society will not be harmed, by the expungement. Wis. Stat. § 973.015(1m)(a)1.

> ***Practice Tip.*** Wis. Stat. § 973.015 provides that "the court may order *at the time of sentencing* that the record be expunged upon successful completion of the sentence." Wis. Stat. § 973.015(1m)(a)1. (emphasis added). Therefore, to ensure the client's opportunity to benefit from this disposition, the defense attorney must request expungement at the sentencing hearing. *See also State v. Arberry*, 2018 WI 7, ¶ 5, 379 Wis. 2d 254, 905 N.W.2d 832 (relying on Wis. Stat. § 973.015 and *State v. Matasek*, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811, in support of its holding that a defendant may not seek expungement after sentence is imposed).
>
> Wis. Stat. § 973.015 does not apply to civil forfeiture violations. *See Kenosha Cnty. v. Frett*, 2014 WI App 127, 359 Wis. 2d 246, 858 N.W.2d 397.

Probation is usually the disposition in expungement situations, but not always. The court may impose any penalty authorized by law, including a fine, incarceration, or probation. *See Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1994). Incarceration could include credit under Wis. Stat. § 973.155 for time served.

The defendant must successfully complete the sentence without being convicted for a subsequent offense and, if on probation, without having the probation revoked. Wis. Stat. § 973.015(1m)(b). On successful completion of the sentence, the detaining or probationary authority must issue a certificate of discharge, which must be forwarded to the court of record and which has the effect of expunging the record. *Id.*

Expungement of misdemeanor convictions does not result in any requirement that the district attorneys or law-enforcement agencies expunge their records related to the conviction. *State v. Leitner*, 2002 WI 77, ¶ 3, 253 Wis. 2d 449, 646 N.W.2d 341. Nor do circuit courts possess inherent powers to order expungement of records maintained by the police. *Breier v. E.C. (In the Int. of E.C.)*, 130 Wis. 2d 376, 387–88, 387 N.W.2d 72 (1986).

The removal of the records is neither instantaneous nor automatic; thus, defense counsel needs to be aware of the practical considerations in implementing the statutory right to expungement. The main issues are timing, communication (transmittal of order), and verification. The timing of expungement depends on when the sentence is satisfactorily completed. For example, if the court places the defendant on probation for 18 months, the right to have the record expunged will not occur until the defendant completes the probation term. The state courts have developed Form CR-266, a mandatory form for a defendant to request expungement after completion of the sentence. Circuit court forms are accessible at https://www.wicourts.gov/forms1/circuit/index.htm (select form category "Criminal" and then "View all criminal forms") (updated Feb. 13, 2022).

Communication of the expungement order is essential, because the clerk of court may not know when the defendant is entitled to have the record expunged. Wis. Stat. § 973.015(1m)(b) requires "the detaining or probationary authority" (usually the county sheriff or the DOC) to send a certificate of discharge to the court on the defendant's successful completion of the sentence or probation term. There is no assurance, however, that a court order for expungement will accompany this certificate to the clerk's office. Therefore, defense counsel should calendar the relevant dates and ensure that the clerk receives the necessary documentation promptly.

Verification involves checking the clerk's records to ensure that the clerk's staff has removed both the paper file and the CCAP records from public access.

3. Expungement of Court Records After Dismissal or Acquittal [§ 8.35]

Dismissal without expungement does not ordinarily entitle the defendant to have court records removed from public access. Thus, an employer could find the CCAP record of a defendant's sexual assault charge even though the defendant has been acquitted or the charge has been dismissed for lack of merit (in fact, the employer might not even examine the record closely enough to learn the ultimate disposition). To remove a record from public access, the defense attorney should seek an order for removal of electronic records, *see* SCR 72.06(2), and for sealing of the entire case file, *see* SCR 72.06(3).

Although there is no statutory authority for Wisconsin courts to expunge or destroy their records, the courts arguably have inherent authority "to manage their own files and determine when they ought to be made public." Memorandum in Support of Amended Wisconsin Supreme Court Petition 09-07, at 2 (submitted by State Bar of Wisconsin, Oct. 27, 2009); *see* https://www.wicourts.gov/supreme/docs/0907petitionamendsupport.pdf. *But see* 67 Wis. Op. Att'y Gen. 301 (1978) (stating that court has no inherent judicial authority to expunge or destroy records), https://www.doj.state.wi.us/dls/ag-opinion-archive (click on "1971 - 1980"; then click on "1978").

4. Removal of Arrest Records [§ 8.36]

Wis. Stat. § 165.84(1) provides that "[a]ny person arrested or taken into custody and later released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in connection therewith returned upon request." The Department of Justice (DOJ) has a process for removing arrest information, accessible online. *See* Wis. Dep't of Just., *Background Check & Criminal History Information*, https://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information (scroll down to "Removal of arrest information") (last visited Oct. 31, 2022).

> ***Practice Tip.*** In cases in which the defense has obtained both an expungement order and a dismissal order, the defense attorney should consider seeking removal of arrest information first. Some attorneys have reported that the DOJ searches for the computerized CCAP record to verify the accuracy of the dismissal order. Thus, if the CCAP order has already been expunged, the DOJ might not remove arrest information or return fingerprint records.

As noted on the DOJ website, expungement following conviction will not facilitate removal of arrest information, unless the charge has been formally dismissed. Similarly, reduction of the charge to a noncriminal violation is insufficient for removal of arrest information.

In some cases, it may be possible to amend arrest information, even if it cannot be completely removed. For example, in one situation a defense attorney obtained a letter from a prosecutor to document that no drug-related charges were issued after an arrest that originally showed up in the Wisconsin Crime Information Bureau (CIB) database as a drug arrest. Because not all charges were dismissed, the CIB would not remove the arrest record; however, the attorney did succeed in amending the record by forwarding the prosecutor's letter to the Criminal History Unit of the CIB. The best practice is to check with the DOJ regarding where and to whom to send the information.

5. Expungement of Delinquency Adjudication [§ 8.37]

Wis. Stat. § 938.355(4m)(a) allows for expungement of delinquency adjudications after the juvenile has turned 17. The court must determine that the juvenile has satisfactorily met the conditions of the dispositional order, that he or she will benefit from expungement, and that society will not be harmed. *Id.* Expungement is mandatory, if the juvenile complies with the dispositional order, for certain first adjudications for violating Wis. Stat. § 942.08 (invasion of privacy). Wis. Stat. § 938.355(4m)(b).

J. Other Special Dispositions [§ 8.38]

1. Conditional Discharge for Possession or Attempted Possession as First Offense [§ 8.39]

Wis. Stat. § 961.47 allows a "conditional discharge" for the offenses of possession or attempted possession of certain controlled substances. The section applies only to possession or attempted possession of a controlled substance under Wis. Stat. § 961.41(3g)

(b) (this subsection excludes substances classified under schedule I, Wis. Stat. § 961.14, and schedule II, Wis. Stat. § 961.16). This conditional discharge is not available when a defendant is found guilty of possession of marijuana contrary to Wis. Stat. § 961.41(3g)(e). *State v. Boyer*, 198 Wis. 2d 837, 842, 543 N.W.2d 562 (Ct. App. 1995) (interpreting earlier version of statute). The offense must be the person's first drug-related offense under Wis. Stat. ch. 961 or any comparable federal statute, state statute, or county ordinance.

If the defendant has pleaded guilty or has been found guilty, the court may withhold a judgment of guilt and, with the defendant's consent, defer further proceedings and place the defendant on probation "upon terms and conditions." Wis. Stat. § 961.47(1). If any term or condition is violated, the court may then enter judgment and sentence the defendant accordingly. *Id.* If all the terms and conditions are fulfilled, the court must discharge the defendant and dismiss the proceedings. *Id.* Thus, there is no adjudication of guilt and no conviction. *Id.*

While the proceedings are held in abeyance, there can be no appeal because there is no final judgment or order. *State v. Ryback*, 64 Wis. 2d 574, 219 N.W.2d 263 (1974).

Conditional discharge is available only once. *Id.*

2. Juvenile Delinquency Adjudication and Disposition [§ 8.40]

Under certain circumstances specified by statute, a criminal charge against a minor may be (1) dismissed, subject to the prosecutor's right to proceed in juvenile court; (2) transferred to juvenile court for further proceedings; or (3) adjudicated as a delinquency case with a juvenile-court disposition. See Quick Reference Guide to Motion Law and Practice, chapter 5, *supra*, for a detailed discussion of the pertinent statutes, and chapter 6, *supra*, for a discussion of negotiation strategies to use when seeking a juvenile adjudication and disposition.

Because of the significant potential benefits to the client and the complexity of the pertinent statutes, defense counsel should consider the possibility of special disposition as a juvenile for any client charged with an offense that allegedly occurred before the client turned 17. Although not all such clients will be eligible for one of these alternatives to adult-court jurisdiction, the defense attorney should thoroughly research the issue.

To advise clients properly regarding possible juvenile dispositions and to advocate effectively in the dispositional phase of their cases, defense counsel must be familiar with the dispositional options under the Juvenile Justice Code, Wis. Stat. ch. 938. The general types of available dispositions are described in Katie York et al., *Wisconsin Juvenile Law Handbook* ch. 11 (State Bar of Wis. 5th ed. 2022).

K. Fines [§ 8.41]

Wis. Stat. § 973.05 sets forth the rules governing payment of fines, special assessments, surcharges, and restitution payments ordered under specific statutes (hereinafter referred to collectively as *fines*).

When the court orders a defendant to pay a fine, the court must explain why a fine is appropriate and determine the defendant's ability to pay. *State v. Ramel*, 2007 WI App 271, ¶¶ 14, 15, 306 Wis. 2d 654, 743 N.W.2d 502. The court may grant permission for the payment to be made within a period not to exceed 60 days. Wis. Stat. § 973.05(1). If no such permission is embodied in the sentence, the fine is payable immediately. *Id.* If the court orders payment of restitution and a fine, the court may authorize a payment period in excess of 60 days. Wis. Stat. § 973.05(1m).

When the court orders a defendant to pay a fine and also places the defendant on probation, the court may make the payment of the fine a condition of probation. Wis. Stat. § 973.05(2). The statutes set forth the order in which payments are to be applied to any surcharges, restitution payments, and fines. Wis. Stat. §§ 973.20(12)(b), (c), 973.05(2m).

In lieu of part or all of a fine, the court may stay the execution of part or all of the sentence and order the defendant to perform community service work. Wis. Stat. § 973.05(3); *see infra* § 8.59.

If the defendant does not pay the surcharges, fines, costs, or fees, as required by the sentence, the court may commit the defendant to the county jail until the fine is paid or the defendant is discharged, but for no longer than six months. Wis. Stat. § 973.07. To avoid imprisonment, the defendant must move the court to remit the obligations based on his or her inability to pay. *See infra* Form 8.70A.

L. Monetary Costs, Fees, and Surcharges [§ 8.42]

1. Introduction [§ 8.43]

In addition to statutorily authorized fines and forfeitures, courts frequently impose other monetary costs, fees, and surcharges in criminal cases. Some also apply to noncriminal forfeiture violations. While some of these fees are mandatory, some are discretionary with the circuit court.

> ***Practice Tip.*** Defense attorneys should familiarize themselves not only with the applicable statutes, but also with the practices of the presiding judge regarding these fees.

2. Taxable Costs [§ 8.44]

Wis. Stat. § 973.06 lists the costs that the court may assess against a criminal defendant. Although the statute uses mandatory language (costs "shall consist of the following items," Wis. Stat. § 973.06(1)(intro.)), it also provides that "[t]he court may remit the taxable costs, in whole or in part." Wis. Stat. § 973.06(2). Thus, the court has discretion whether to impose any of the authorized costs.

The authorized costs include certain law-enforcement costs, witness fees, attorney fees, fees for court-ordered HIV tests, contributions to crime prevention organizations, and 10% of the amount of restitution ordered. Wis. Stat. § 973.06(1).

3. Fees and Surcharges as Part of Sentencing [§ 8.45]

Numerous statutes provide for the court to impose monetary fees and surcharges in addition to the fine or forfeiture. Some of these items apply to all fines and forfeitures; others apply only to limited types of cases. Because the legislature frequently adds, or increases the amounts of, fees and surcharges, the total amount due for a given fine or forfeiture is subject to change.

> ***Practice Tip.*** Defense attorneys should familiarize themselves with the fees applicable to specific cases. Wis. Stat. § 814.76 lists the surcharges and provides the statutory reference for each. *See also* Wis. Stat. § 814.75 (listing all the surcharges in Wis. Stat. § 814.76 and others that may apply if the defendant is ordered to pay a forfeiture for a noncriminal violation). The Wisconsin Court System's website posts a chart of all fees and surcharges. *See* Wis. Ct. Sys., *Wisconsin Circuit Court Fee, Forfeiture, Fine and Surcharge Tables*, https://www.wicourts.gov/courts/circuit/docs/fees.pdf (updated Apr. 26, 2024); *infra* app. C (chart).

4. Additional Costs [§ 8.46]

The following costs may be assessed by the county or the DOC:

1. Partial reimbursement fee assessed by the DOC to probationers, parolees, and persons on extended supervision, Wis. Stat. § 304.074(2);
2. Prisoner reimbursement to the county for costs of incarceration, Wis. Stat. § 302.372; and
3. Prisoner reimbursement to the county for medical services, Wis. Stat. § 302.381.

M. Restitution [§ 8.47]

1. General Provisions [§ 8.48]

a. Introduction [§ 8.49]

When imposing sentence or ordering probation, the court *must* enter an order for full or partial restitution to the victim unless it finds substantial reason not to do so and states the reason on the record. Wis. Stat. §§ 973.09(1)(b), 973.20(1r); *Huml v. Vlazny*, 2006 WI 87, ¶ 20, 293 Wis. 2d 169, 716 N.W.2d 807. The court may order restitution in cases in which there is a sentence of incarceration. *See* Wis. Stat. § 973.20(1r). The Wisconsin Supreme Court has recognized that restitution is a reasonable and appropriate condition of probation. *See State v. O'Connor*, 77 Wis. 2d 261, 252 N.W.2d 671 (1977).

The court may defer its decision on restitution until after the sentencing hearing. *See* Wis. Stat. § 973.20(13)(c). The time limits under this subsection are directory, not mandatory; thus, the court may impose a valid restitution order outside of these time limits. *State v. Johnson*, 2002 WI App 166, ¶ 8, 256 Wis. 2d 871, 649 N.W.2d 284. In reviewing a belated restitution order, the appellate court considers the length of the delay, the reason for the delay, and the prejudice to the defendant from the delay. *See State v. Ziegler*, 2005 WI App 69, ¶ 18, 280 Wis. 2d 860, 695 N.W.2d 895; *see also State v. Strenke*, No. 2019AP1451-CR, 2021 WL 1540097 (Wis. Ct. App. Apr. 20, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (recognizing that there might be circumstances in which court of appeals will uphold circuit court's restitution order even when no valid reason existed for circuit court's delay). The court cannot delegate to the DOC the authority to determine the amount of restitution. *State v. Evans*, 2000 WI App 178, ¶ 15, 238 Wis. 2d 411, 617 N.W.2d 220.

When restitution is ordered, it is a condition of probation, parole, or extended supervision. Wis. Stat. § 973.20(1r). The Wisconsin Supreme Court adopted the ABA Standards for Criminal Justice—Probation § 3.2 (1970), *see Standards for Criminal Justice—Sentencing*, *supra* § 8.16, at § 18-3.15 (1994) (current version), which supports restitution within the probationer's means as an acceptable condition of probation. *See State v. Garner*, 54 Wis. 2d 100, 194 N.W.2d 649 (1972); *see also Edwards v. State*, 74 Wis. 2d 79, 246 N.W.2d 109 (1976); *State v. Gerard*, 57 Wis. 2d 611, 205 N.W.2d 374 (1973). When probation or other supervision is terminated, however, or if the defendant has not been placed on supervision, the restitution order is the equivalent of a civil judgment and is enforceable in the same manner. Wis. Stat. § 973.20(1r); *Huml*, 2006 WI 87, ¶ 33, 293 Wis. 2d 169.

b. Compensation for Victims in General [§ 8.50]

The restitution statute promotes the legislative goal of providing compensation to crime victims. *Huml v. Vlazny*, 2006 WI 87, ¶ 22, 293 Wis. 2d 169, 716 N.W.2d 807 (noting also policy against allowing double recovery). The definition of *victim* in Wis. Stat. § 950.02(4)(a) applies to determining eligibility for restitution. *State v. Gribble*, 2001 WI App 227, ¶¶ 71–75, 248 Wis. 2d 409, 636 N.W.2d 488 (holding that parent of deceased child was a victim).

The state is not a "victim" of the crime, under Wis. Stat. § 973.20(1r), when the damage or loss occurs in the normal course of law-enforcement activities. *See, e.g.*, *State v. Haase*, 2006 WI App 86, ¶ 10, 293 Wis. 2d 322, 716 N.W.2d 526; *State v. Storlie*, 2002 WI App 163, ¶ 10, 256 Wis. 2d 500, 647 N.W.2d 926. Thus, the court may not order restitution for expenses incurred in investigating crime or in apprehending suspects. *See, e.g.*, *Haase*, 2006 WI App 86, 293 Wis. 2d 322 (discussing damage to squad car during pursuit of defendant); *Storlie*, 2002 WI App 163, 256 Wis. 2d 500 (discussing damage to "stop sticks" used to end a high-speed chase). A governmental entity, however, is entitled to restitution when the defendant's conduct is directly targeted at government property. *See, e.g.*, *State v. Vanbeek*, 2009 WI App 37, ¶ 11, 316 Wis. 2d 527, 765 N.W.2d 834; *State v. Ortiz*, 2001 WI App 215, ¶¶ 20–22, 247 Wis. 2d 836, 634 N.W.2d 860.

For certain property crimes, victims may seek monetary awards through statutes that provide for civil liability. *See* Wis. Stat. §§ 943.245 (worthless checks), 943.48 (theft of telecommunication services), 943.51 (retail theft).

c. Property Crimes [§ 8.51]

If a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require, pursuant to Wis. Stat. § 973.20(2), that the defendant do one of the following:

1. Return any property; or

2. If return of the property is impossible, impractical, or inadequate, pay either the reasonable repair or replacement cost, or the greater of the following:
    a. The property's value on the date of its damage, loss, or destruction; or
    b. The property's value on the date of sentencing, less the value of any property returned.

The defendant may be entitled to credit toward restitution for work performed for the victim that increased the value of the victim's property. *See State v. Longmire*, 2004 WI App 90, ¶ 19, 272 Wis. 2d 759, 681 N.W.2d 534.

Note. The value of retail merchandise is its retail value, Wis. Stat. § 973.20(2)(b)2., and not, as would seem more just, the cost to the merchant.

d. Crimes Causing Bodily Injury or Death [§ 8.52]

If a crime considered at sentencing resulted in bodily injury, the restitution order may require, pursuant to Wis. Stat. § 973.20(3), that the defendant do any of the following:

1. Pay the cost of necessary medical and related professional services and devices relating to the victim's physical, psychiatric, and psychological care and treatment;
2. Pay the cost of the victim's necessary physical and occupational therapy and rehabilitation;
3. Compensate the victim for any income lost as a result of a crime considered at sentencing; and
4. Pay for the costs of a homemaker, if the victim's sole duties were those of a homemaker.

If a crime considered at sentencing resulted in death, the restitution order may also require that the defendant pay for necessary funeral and related services. Wis. Stat. § 973.20(4); *see also* Wis. Stat. § 950.02(4)(a)1., 4. (including in definition of *victim* certain family members and persons who resided with a deceased person against whom a crime has been committed).

2. Scope of Restitution Orders [§ 8.53]

Wis. Stat. § 973.20(5)(a) provides that a restitution order may require payment of "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action" arising from the criminal conduct. *Special damages* are actual monetary losses; *general damages* are those not readily calculable in monetary terms, such as pain, suffering, humiliation, and damage to reputation. *State v. Stowers*, 177 Wis. 2d 798, 804–05, 503 N.W.2d 8 (Ct. App. 1993).

Thus, an order for $5,000 restitution, intended to cover undocumented counseling costs and to redress the defendant's wrongful treatment of the victim, was reversed as an unauthorized assessment of general damages. *Id.* at 805–06. Restitution was properly ordered, however, for the salaries of bank employees who investigated a crime committed against the employer. *State v. Rouse*, 2002 WI App 107, ¶ 16, 254 Wis. 2d 761, 647 N.W.2d 286. Similarly, if established with reasonable certainty, a victim's lost profits are appropriately included as part of a restitution order. *State v. Johnson*, 2005 WI App 201, ¶¶ 16–17, 287 Wis. 2d 381, 704 N.W.2d 625.

Notwithstanding the broad language about special damages, the court may not order the defendant to pay interest to the victim as part of restitution. *State v. Hufford*, 186 Wis. 2d 461, 465–68, 522 N.W.2d 26 (Ct. App. 1994) (relying heavily on legislative history of restitution statute in reaching this decision).

Specific statutory provisions allow the court to order restitution for the following items:

1. The victim's lost income and reasonable out-of-pocket expenses in connection with the investigation and prosecution of the crime, Wis. Stat. § 973.20(5)(b);

2. Amounts paid by any person or agency as rewards for information leading to the apprehension or successful prosecution of the defendant, Wis. Stat. § 973.20(5)(c);

3. Compensation paid to a victim, by any person or agency, in connection with the crime, Wis. Stat. § 973.20(5)(d); and

4. Reimbursement to the state for any crime victim compensation paid under Wis. Stat. ch. 949, Wis. Stat. § 973.20(9).

3. Determination of Defendant's Ability to Pay Restitution [§ 8.54]

The determination of restitution is a twofold process. First, the court must determine how much restitution is due the victim. *See supra* §§ 8.47–.53. Second, the court must set the restitution based on the defendant's ability to pay. Although imposing restitution can aid rehabilitation by strengthening the offender's sense of responsibility, imposing conditions of probation that are beyond the probationer's financial means or otherwise beyond his or her control undermines that sense of responsibility. *Huggett v. State*, 83 Wis. 2d 790, 798–99, 266 N.W.2d 403 (1978).

The court must consider the following factors, under Wis. Stat. § 973.20(13)(a):

1. The amount of loss suffered by any victim as a result of the crime considered at sentencing;

2. The defendant's financial resources and the defendant's present and future earning ability, *State v. Pope*, 107 Wis. 2d 726, 321 N.W.2d 359 (Ct. App. 1982);

   Note. The defendant does not need to address and disprove every imaginable source of potential income. *Id.* at 733. Circuit courts should not be reluctant, however, to order restitution simply because of a defendant's indigence. *Id.*

3. The needs and earning ability of the defendant's dependents; and

4. Any other factors the court deems appropriate.

The court may order restitution of less than the full damages caused if the defendant does not have the financial resources or future ability to pay full restitution. The court may not set an amount of restitution so high as to demonstrate a disregard of its obligation to exercise discretion. *Id.*

If it is apparent at sentencing that the defendant cannot pay all, or even a substantial part, of the restitution, the possibility exists that the court may sentence the defendant to incarceration. But to deny probation solely on the grounds that the defendant is unable to pay restitution probably constitutes impermissible imprisonment for debt and a denial of equal protection. *See, e.g.*, *Huggett*, 83 Wis. 2d at 803–04 (holding that it is improper to extend probation when probationer made good-faith effort to pay); *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 289, 201 N.W.2d 778 (1972) (holding that incarceration of indigent person for nonpayment of fine violates equal protection).

Although the court must consider ability to pay, the court is not limited to considering the amount that the defendant can pay during the sentence or probation term. *State v. Fernandez*, 2009 WI 29, ¶¶ 3–5, 316 Wis. 2d 598, 764 N.W.2d 509. Therefore, if the court places a defendant on probation for two years, the court may consider the defendant's earning capacity over a longer time period.

If a probationer lacks the capacity to pay restitution in whole or in part, but has demonstrated a good-faith effort to make restitution, failure to fulfill this condition of probation may not be cause for extending probation. *Huggett*, 83 Wis. 2d at 803. Revocation of probation for failure to pay restitution, costs, or a fine is a due process violation, unless the court has made a finding of willful refusal. *Bearden v. Georgia*, 461 U.S. 660, 665–68 (1983).

Practice Tip. Relevant factors in determining the defendant's financial resources, obligations, and ability to pay restitution include the following:

1. The defendant's level of education and training,
2. The defendant's employment history,
3. The defendant's current employment status,
4. The defendant's prospects for future employment,
5. The defendant's present sources and amounts of income,
6. Any other potential sources of income for the defendant,
7. The length of probation,
8. The costs of supporting dependents,
9. Other competing demands on the defendant's income, and
10. The potential for restitution from co-defendants.

The following may not be available for restitution purposes:

1. Property exempt from execution, Wis. Stat. § 815.18; and

2. Assistance grants. Wis. Stat. § 49.96 provides that

> [a]ll grants of aid to families with dependent children, payments made under [sections] 48.57(3m) or (3n), 49.148(1)(b)1. or (c) or (lm) or 49.149 to 49.159, payments made for social services, cash benefits paid by counties under [section] 59.53(21), and benefits under [section] 49.77 or federal Title XVI, are exempt from every tax, and from execution, garnishment, attachment and every other process and shall be inalienable.

4. Procedures for Determining Amount of Restitution [§ 8.55]

Before the restitution hearing, the district attorney should obtain from the victim information relevant to restitution. Wis. Stat. § 973.20(13)(b).

At the hearing, the defendant may stipulate to all or part of the restitution requested and present evidence and arguments concerning the factors listed above. Wis. Stat. § 973.20(13)(c). If the amount of restitution can be readily determined at that time, and if there is no dispute on the amount of restitution and the factors listed above, the court can then set the amount of restitution. Wis. Stat. § 973.20(13)(c). If there is a dispute about the amount of restitution, the court may do any of the following:

1. Order restitution of amounts not in dispute and direct the appropriate agency to file a proposed restitution order within 90 days, Wis. Stat. § 973.20(13)(c)1.;

2. Adjourn sentencing for up to 60 days pending resolution of the amount of restitution by the court, referee, or arbitrator, Wis. Stat. § 973.20(13)(c)2.;

3. With the defendant's consent, refer the disputed restitution issues to an arbitrator acceptable to all parties, whose determination is final and, when filed, is incorporated into the judgment, Wis. Stat. § 973.20(13)(c)3.; or

4. Refer the disputed restitution issues to a court commissioner or other appropriate referee, who will conduct a hearing on the matter and submit the record of the hearing, together with proposed findings of fact and conclusions of law, to the court within 60 days, after which the court will determine the amount of restitution based on the record of the hearing, Wis. Stat. § 973.20(13)(c)4.

Practice Tip. Practice in Wisconsin seems to lag behind the statutory procedure that is outlined above. The present restitution statute was passed in 1987; only minor amendments have been passed since then. The statute codified earlier court decisions that set out the purpose, practice, and limits of restitution. The statutory procedure of arbitration or hearing by a referee or court commissioner has been grafted onto those decisions. It is unusual for the courts to follow this procedure. It is much more common for the courts to set restitution at sentencing and for the defendant to raise issues in a postsentencing motion. *See infra* Form 8.69A.

The importance of the restitution issue to the client varies significantly from case to case. Often, the client is more concerned about possible incarceration and may wish to pay restitution before sentencing or, if unable to pay upfront, to defer the issue.

The burden of proof, rules of evidence, and rules of procedure at a restitution hearing are as follows:

1. The victim carries the burden of demonstrating, by the preponderance of the evidence, the amount of loss sustained. The district attorney need not represent the victim, unless the hearing is held at or before the sentencing proceeding or the court so orders. Wis. Stat. § 973.20(14)(a).

2. The defendant carries the burden of demonstrating, by the preponderance of the evidence, his or her financial resources, present and future earning ability, and the needs and earning ability of his or her dependents. The State Public Defender need not represent any indigent defendant, unless the hearing is held at or before the sentencing proceeding, the defendant is incarcerated when the hearing is held, or the court so orders. Wis. Stat. § 973.20(14)(b).

3. Discovery is not available before the restitution hearing, except for good cause shown. Wis. Stat. § 973.20(14)(d).

4. If the defendant is incarcerated, he or she may participate by telephone under Wis. Stat. § 807.13, unless the court issues a writ or subpoena compelling the defendant to appear in person. Wis. Stat. § 973.20(14)(d).

5. The court may waive the rules of practice, procedure, pleading, or evidence, except for those provisions relating to privileged communications and personal transactions or communication with a decedent or mentally ill person. The object of the proceedings is to "do substantial justice between the parties." *Id.*

6. All parties have the right to be heard, personally or through counsel, to present evidence, and to cross-examine witnesses. *Id.*

The court may require that restitution be paid immediately, within a specified period, or in specified installments. Wis. Stat. § 973.20(10)(a). If the defendant is placed on probation or sentenced to imprisonment, the end of the specified payment period must not extend beyond the end of the period of probation or extended supervision. *Id. But see State v. Fernandez*, 2009 WI 29, ¶¶ 3–5, 316 Wis. 2d 598, 764 N.W.2d 509 (holding that length of sentence does not limit the amount of restitution that the court may order).

The defendant must make payments to the DOC if the defendant is placed on probation or sentenced to prison. If the defendant is not placed on probation or sentenced to prison, the court may order the defendant to make payments to the clerk of court. Wis. Stat. § 973.20(11)(a).

A restitution order does not limit the right of a victim to sue in a civil action, but payments under the restitution order are set off against any civil judgment. Wis. Stat. § 973.20(8); *see also Huml v. Vlazny*, 2006 WI 87, ¶ 22, 293 Wis. 2d 169, 716 N.W.2d 807.

5. Practice Tips [§ 8.56]

Determining the amount of restitution is often the most complicated part of a case and therefore may be the most crucial service defense counsel can render for a client. It is common for the victim to exaggerate his or her losses. However, the defense attorney must also recognize the risk of alienating the judge with an aggressive challenge to a sympathetic victim; for example, the court might infer a lack of remorse or insight if the client seems primarily focused on the restitution issue.

Therefore, the attorney may be wise, in some cases, to simply allow the court to order restitution at the time of sentencing and then to concentrate on working out a settlement with the victim. The attorney should advise the client, however, to notify the attorney promptly of any civil action or notice of intent to bring an action that the client receives. *See, e.g.*, Wis. Stat. §§ 943.212, 943.245, 943.48, 943.51 (civil liability related to specified property offenses). Any settlement agreement should seek to resolve both the criminal-restitution issues and any potential civil claims. *See* Wis. Stat. § 973.20(1r), (8).

The likelihood of restitution can be a powerful argument in favor of probation. In relatively minor cases, payment of restitution before sentencing may help in obtaining a dismissal or amendment of the charge to an ordinance violation.

If the issues include the amount of restitution or whether the victim is entitled to restitution, the defense attorney should consider the following avenues of attack:

1. Estimates of experts or appraisers that the loss claimed is overstated;

2. Testimony of the defendant, accomplices, or other witnesses that items allegedly stolen were, in fact, not stolen;

3. In cases in which the victim claims restitution for services provided, evidence that the victim did not exercise due diligence in demanding payment for the services, Wis. Stat. § 943.51(1)(am);

4. Responses of the victim or victim's family, friends, or ex-spouse to questions about the value or actual existence of the item(s) (e.g., Who purchased the item? Was it a gift? What was the retail value of the item? When and where was it purchased? What is its value today? Has anyone seen the victim wearing or using the item? Has anyone seen the item in the victim's home? Are there any family photographs in which the item can be seen?);

5. Subpoenas to the victim or the alleged place of purchase for receipts, etc.; and

6. Subpoenas to insurance carriers for the value claimed on insurance or for the lack of a specific declaration of an item that should have been declared for insurance purposes before the loss.

The defense attorney should consider asking the court to waive fines, costs, assessments, and attorney fees when ordering restitution. Wis. Stat. § 973.20(12)(b) provides that these costs are subordinate to restitution. Restitution is also an option under an agreement for deferred prosecution or deferred judgment, under Wis. Stat. §§ 971.37, 971.38, and 971.39. The possibility of restitution is a potent argument in favor of deferred prosecution or deferred judgment, and restitution could be coupled with any of the more traditional conditions of deferred prosecution or deferred judgment and even an agreement to settle any potential civil-liability claims. *See supra* Forms 6.37A–.37E.

N. Work Release or Huber Law Privileges [§ 8.57]

Any person sentenced to the county jail or a probationer detained in jail may be granted the privilege of leaving the jail for purposes specified in Wis. Stat. § 303.08, popularly known as the Huber law after the legislator who sponsored the original legislation. The court may grant Huber privileges for the following purposes: (1) seeking employment or engaging in employment training; (2) working at employment; (3) performing community service work under Wis. Stat. § 973.03; (4) conducting any self-employed occupation, including housekeeping and caring for the needs of the person's family; (5) attending court hearings as a party or a subpoenaed witness; (6) attending school; (7) obtaining medical treatment, counseling, or therapy; (8) attending an assessment for possible counseling or therapy; (9) attending a parenting program; and (10) meeting with the person's supervising probation, parole, or extended supervision officer. Wis. Stat. § 303.08(1).

If the court orders incarceration as a condition of probation, the court may grant release for work or for other authorized activities. *See* Wis. Stat. § 973.09(4). The *other authorized activities*, set forth in Wis. Stat. § 303.08(1), are those listed above. An earlier version of Wis. Stat. § 973.09(4) provided for automatic release of probationers for work. *See State v. Gloudemans*, 73 Wis. 2d 514, 243 N.W.2d 220 (1976).

> ***Practice Tip.*** The holding in *Gloudemans* has never been overruled or explicitly changed by statutory amendment. Nevertheless, many courts read the current Wis. Stat. § 973.09(4), which incorporates by reference the permissible purposes of release under Wis. Stat. § 303.08(1), as allowing the imposition of confinement without release time. The defense attorney should be prepared to argue for release privileges for such activities as work, child care, education, or participation in treatment or counseling programs.

Huber law privileges under Wis. Stat. § 303.08 should not be confused with work release under Wis. Stat. § 973.09(4). *Yingling v. State*, 73 Wis. 2d 438, 243 N.W.2d 420 (1976). A person receiving Huber law privileges is serving a sentence. A person confined as a condition of probation is not serving a sentence. Huber law privileges should also be distinguished from work release for prison inmates under Wis. Stat. § 303.065.

If Huber law privileges are unavailable or impractical, other options to lessen the disruptive effect of a jail sentence may be used, including serving the sentence on home monitoring or in 48- or 72-hour installments. *See infra* §§ 8.60, .61.

O. Other Sentencing Alternatives [§ 8.58]

1. Community Service [§ 8.59]

The court may order the defendant to perform community service work for a public agency or nonprofit charitable organization in lieu of part or all of a fine, Wis. Stat. § 973.05(3), as part of a sentence of imprisonment in the county jail or a Huber facility, Wis. Stat. § 973.03(3), or as a condition of probation, Wis. Stat. § 973.09(7m). The order applies only if the defendant and the agency or organization agree. Wis. Stat. §§ 973.03(3)(b), 973.05(3)(b), 973.09(7m)(a). Community service work may also earn the defendant good time toward a jail sentence under Wis. Stat. § 973.03, or satisfy part or all of a fine imposed under Wis. Stat. § 973.05. Wis. Stat. §§ 973.03(3)(a), 973.05(3)(a), 973.09(7m)(a).

The hours required may not exceed what would be reasonable considering the seriousness of the offense and any other read-in offense. Wis. Stat. §§ 973.03(3)(b), 973.05(3)(b), 973.09(7m)(a).

The court must ensure that the defendant is provided with a written statement of the terms of the community service order and that the community service order is monitored. Wis. Stat. §§ 973.03(3)(b), 973.05(3)(b), 973.09(7m)(a). Any organization or agency acting in good faith under such an order has immunity from any civil liability in excess of $25,000 for acts or omissions by or affecting the defendant. Wis. Stat. §§ 973.03(3)(c), 973.05(3)(c), 973.09(7m)(b).

The court may not order community service under Wis. Stat. § 973.03 if the defendant is being sentenced for certain felonies. *See* Wis. Stat. § 973.03(3)(e).

2. Electronic Monitoring [§ 8.60]

Either the court or the sheriff may allow a jail sentence to be served at home under a program of electronic monitoring. *See* Wis. Stat. §§ 302.425(2) (sheriff's authority), 973.03(4)(a) (court's authority).

The sheriff's authority to place a person in a home detention program, subject to electronic monitoring, extends to inmates awaiting trial, convicted of an offense, or serving a sentence for an offense. Wis. Stat. § 302.425(2); *State v. Schell*, 2003 WI App 78, ¶ 11, 261 Wis. 2d 841, 661 N.W.2d 503. Under the doctrine of separation of powers, the court may not prohibit the sheriff from placing a defendant in the home monitoring program. *Schell*, 2003 WI App 78, ¶¶ 14, 15, 251 Wis. 2d 841. A county sheriff (or superintendent of a house of corrections) may also transfer an inmate to home detention before or after sentencing. Wis. Stat. § 302.425(2). This program also requires the inmate's agreement and the use of an "active electronic monitoring system." Wis. Stat. § 973.03(3). The length of detention may not exceed the maximum possible period of imprisonment. Wis. Stat. § 973.03(4)(a).

In lieu of a sentence of imprisonment to the county jail, and with the defendant's agreement, the court may impose a sentence of detention at the defendant's place of residence or another place designated by the court. *Id.* The defendant must wear an electronic device at all times so that the detention may be monitored. *Id.* The court may order home monitoring as a "reasonable and appropriate" condition of probation under Wis. Stat. § 973.09(1)(a). *State v. Eastman*, 220 Wis. 2d 330, 338, 582 N.W.2d 749 (Ct. App. 1998) (dictum). When the court orders jail time as a required condition of probation under Wis. Stat. § 973.09(1)(d), however, it may not order that the time be served on electronic monitoring. *Eastman*, 220 Wis. 2d at 332–33.

> ***Practice Tip.*** The defense attorney should be aware of the attitudes and policies of the judge and the sheriff toward release on electronic monitoring. These attitudes and policies may change over time, not only because of personnel changes but also because of such factors as economic pressures on justice system agencies and improvements in technology. The attorney should also be aware of the availability of monitoring equipment and the fees that the client must pay for participation in the program.

The court, sheriff, or superintendent must ensure that the defendant is provided with a written statement of the terms of the home detention, which may include a requirement that the defendant pay a daily fee to cover the monitoring costs. Wis. Stat.

§ 302.425(2), (3). If the defendant fails to comply with the terms of the sentence, the court may order that the remainder of the sentence be served in the county jail. Wis. Stat. § 973.03(4)(c). The sheriff or superintendent has the authority to transfer an inmate from home detention to the jail or house of corrections. Wis. Stat. § 302.425(2).

3. Jail Sentence on Weekends [§ 8.61]

For most offenses, the court may order the defendant to serve a jail sentence in a series of 48- or 72-hour time periods, instead of serving a continuous sentence. Wis. Stat. § 973.03(5)(b). This option is potentially useful when work release, *see supra* § 8.57, is impractical.

4. Day Reporting Program [§ 8.62]

Several counties have day reporting programs, which typically provide structured supervision and rehabilitative services to persons who might otherwise be in jail. Court-ordered participation in this type of program may take the form of a condition of bond, a condition of deferred prosecution, a condition of probation, or an alternative to a jail sentence. *See* Wis. Stat. §§ 967.11(2), 973.03(4)(a), 16.964(12) (recognizing the use of a day reporting program as part of a program providing alternatives to incarceration).

P. Other Sentencing Provisions and Collateral Consequences [§ 8.63]

The standard consequences of criminal convictions are incarceration, probation, and monetary penalties. In addition, however, some convictions result directly in mandatory loss of driving privileges. *See, e.g.*, Wis. Stat. §§ 343.30 (OWI and other specific traffic offenses), 961.50 (controlled substance offenses). Also, some convictions result in significant collateral consequences that are not stated in the penalty provisions for the specific offense. *See, e.g.*, Wis. Stat. §§ 6.03(1)(b) (felony conviction results in loss of right to vote; however, this right is restored upon completion of imprisonment or probation, Wis. Stat. §§ 304.078(3)), 301.45 (sex offender registration), 941.29 (felony results in loss of right to possess a firearm), 968.20(1m) (restriction on returning dangerous weapons seized as evidence); 8 U.S.C. § 1182; 8 U.S.C. § 1227 (certain convictions carry potential of deportation for noncitizens). *See generally supra* ch. 6.

Despite the difficulty in knowing every potential indirect consequence of a conviction, the defense attorney should be aware of a client's major concerns, such as immigration consequences, employment, or firearm possession. The attorney should discuss these concerns with the client early in the representation because the client's priorities may influence negotiations to settle the case.

Q. Sentencing Hearing [§ 8.64]

In felony cases, the defendant "shall be present" at the sentencing hearing. Wis. Stat. § 971.04(1)(g); *State v. Koopmans*, 210 Wis. 2d 670, 680, 563 N.W.2d 528 (1997). While the defendant has the right to be physically present in the same courtroom as the sentencing judge, a defendant may waive that right and appear by videoconferencing. *See* Wis. Stat. § 885.60; *see also State v. Soto*, 2012 WI 93, ¶ 2, 343 Wis. 2d 43, 817 N.W.2d 848; *State v. McReynolds*, 2022 WI App 25, ¶¶ 44–70, 402 Wis. 2d 175, 975 N.W.2d 275 (holding that circuit court's use of Wis. Stat. § 973.017(10m) to state reasons for sentencing decision in writing, rather than orally in court during sentencing hearing, did not violate defendant's constitutional right to be present at sentencing). In misdemeanor cases a defendant may waive his or her presence entirely and, with leave of the court, provide written authorization for his or her attorney to appear. Wis. Stat. § 971.04(2); *supra* Form 3.117A and accompanying commentary and instructions.

The defendant has the right, called the *right to allocution*, to make a statement before the sentence is pronounced. Wis. Stat. § 972.14(2). The defendant's right to allocution is in addition to the defense attorney's right to make a statement or argument on the defendant's behalf. *See* Wis. Stat. § 972.14(2).

In a felony case, the victim has the right to make a statement relevant to the sentence before the sentence is pronounced. Wis. Stat. § 972.14(3)(a). The court also may allow any other person to make a statement relevant to the sentence. *Id.* The defense has the right to rebut adverse evidence or information, but does not have an absolute right to cross-examine witnesses at a sentencing hearing. *See State v. Damaske*, 212 Wis. 2d 169, 195–97, 567 N.W.2d 905 (Ct. App. 1997).

The judge must inform the defendant personally of the right to seek postconviction relief and, if the defendant is indigent, of the right to the assistance of the State Public Defender. Wis. Stat. § 973.18(2). The judge must also have the defendant and the defense attorney sign a form indicating that (1) the attorney has counseled the defendant regarding the decision to seek postconviction relief, and (2) the defendant understands that a notice of intent to seek postconviction relief must be filed within 20 days after sentencing. Wis. Stat. § 973.18(3); *see infra* Form 8.72A (CR-233 Notice of Right to Seek Postconviction Relief); *see also infra* Form 9.47A (Notice of Intent to Pursue Postconviction Relief). *See generally infra* ch. 9 (Postconviction Proceedings).

The judgment of conviction must set forth the plea, the verdict or finding, the adjudication and sentence, and the sentence credit to be granted. Wis. Stat. § 972.13(3). A copy of the judgment constitutes authority for the sheriff to execute the sentence. Wis. Stat. § 972.13(5).

At a resentencing hearing, the court may consider all relevant information, including events occurring after the original sentencing. *State v. Carter*, 208 Wis. 2d 142, 157–58, 560 N.W.2d 256 (1997). Under some circumstances, however, an increased sentence is presumptively vindictive and may be overturned absent objective information regarding the defendant's conduct after the original sentencing. *State v. Church*, 2003 WI 74, ¶ 55, 262 Wis. 2d 678, 665 N.W.2d 141. *But see State v. Naydihor*, 2004 WI 43, ¶ 56, 270 Wis. 2d 585, 678 N.W.2d 220 (holding that there was no presumption of vindictiveness when circuit court vacated original sentence and different judge imposed second sentence); *State v. Sturdivant*, 2009 WI App 5, ¶ 14, 316 Wis. 2d 197, 763 N.W.2d 185 (holding that, although new sentence was longer than original sentence, it was not tainted by vindictiveness when record showed implementation of court's original intent).

R. Sentencing After Revocation of Supervision [§ 8.65]

Although most persons placed on supervision successfully complete their term of supervision, a significant number of revocation proceedings occur. As explained below, revocation of probation may result in a sentencing hearing and possibly in substantial imprisonment. Revocation of parole or extended supervision results in an administrative decision, rather than a court hearing, to determine the incarceration time after revocation. *See* Wis. Stat. §§ 302.11(7)(am), 302.113(9) (administrative discretion to return parolee or person on extended supervision to prison for up to remainder of sentence, less time previously served).

Not all probationers whose probations are revoked return to court for sentencing after revocation. If the court originally imposed and stayed a sentence when it placed a defendant on probation, *see* Wis. Stat. § 973.09(1)(a), revocation results in the defendant beginning to serve the sentence previously ordered. *See* Wis. Stat. § 973.10(2)(b). The probationer receives sentence credit for "all days spent in custody in connection with the course of conduct for which the sentence was imposed." Wis. Stat. § 973.155(1)(a); *see also* Wis. Stat. § 304.072(5) (credit for time in custody pending revocation); *supra* § 8.27. Also, despite the term "prison" in Wis. Stat. § 973.10(2)(b), a sentence of less than one year, after revocation, is served in county jail. *See* Wis. Stat. § 973.02.

If the court originally withheld sentence when it placed a defendant on probation, *see* Wis. Stat. § 973.09(1)(a), revocation results in the defendant's return to the court for sentencing. *See* Wis. Stat. § 973.10(2)(a). The defendant faces the full range of potential penalties for the offense(s) for which he or she was placed on probation, subject to any applicable sentence credit. *See* Wis. Stat. § 973.155; *see also supra* § 8.27.

When extended supervision is revoked (following the defendant's completion of the confinement portion of a bifurcated felony sentence, *see supra* § 8.14), revocation results in an administrative decision regarding the reconfinement time. The *reviewing authority* is either the DOC or the hearing examiner assigned to the revocation proceeding. *See* Wis. Stat. § 302.113(9)(ag). The reviewing authority may order imprisonment for all or part of the time remaining on the bifurcated sentence, which is the total bifurcated sentence less time already served in confinement. Wis. Stat. § 302.113(9)(am). If the defendant receives less than the maximum term of confinement following revocation, the remaining time becomes a second period of extended supervision. *See* Wis. Stat. § 302.113(9)(b).

> ***Example.*** A defendant was originally given a seven-year bifurcated sentence, consisting of four years of confinement and three years of extended supervision. If extended supervision is later revoked, the defendant faces a maximum term of three years of confinement (seven-year total sentence less four years already served). Even if the defendant had completed two years of the extended supervision before violating the rules of supervision, he or she may still be confined for three years; the "street time" served on extended supervision does not reduce the potential penalties following revocation. If the decision-maker imposes two

years of confinement after the revocation, the defendant will have one year left as a second term of extended supervision. In the unfortunate event of a second revocation of extended supervision, the defendant will face a maximum of one year of confinement (the original seven-year bifurcated sentence less the two previous periods of confinement).

IV. Checklist of Defense Strategies at Sentencing (CRM-0121) [§ 8.66]

❑ Be prepared to rebut the use of previous convictions as a basis for an increased sentence.

❑ Consider possible arguments against incarceration, such as the following:

- Incarceration is not necessary to protect the community.
    - The client has a nonviolent history.
    - The client had limited involvement or culpability in the crime.
    - The crime was an isolated incident.
    - The factors leading to the crime have been alleviated (e.g., the client has obtained needed psychiatric or chemical dependency help).
- Incarceration is not necessary to rehabilitate the client.
    - The client has already taken the first, and most important, step toward rehabilitation—recognizing and accepting responsibility for the crime.
    - The client has obtained needed professional help to deal with personal problems.
    - The client has already been, and will continue to be, punished (e.g., time spent in jail before conviction or posting bail, personal humiliation over the charge, attorney fees, lost wages, fines, costs, and restitution).
    - Conviction for a crime causes future disabilities, especially in the case of a felony.
    - Probation is not a mere “slap on the wrist” but a significant deprivation of liberty.
- Incarceration would be inappropriate and unjust.
    - Incarceration would prevent payment of restitution, costs, fines, and attorney fees.
    - Incarceration would punish the client’s family by removing a breadwinner and needed parent.
    - Incarceration would be an unnecessary burden on the taxpayers, who would have to pay to house and feed the client in a county jail, house of correction, or state prison, and to support the client’s family on welfare.
    - Incarceration would increase the risk of recidivism (this argument may derive support from data showing that a community-based alternative, such as treatment overseen by a problem-solving court, reduces recidivism).

❑ In appropriate cases, seek alternatives to a criminal conviction and sentence.

Note. The following alternatives are most commonly considered in connection with plea negotiations preceding a sentencing hearing. *See supra* ch. 6. Nevertheless, they should not be ruled out. Counsel should remember that the prosecutor and the sentencing judge have the discretion to select such alternatives even when the case is scheduled for sentencing.

- Consider diversion programs and deferred entry-of-judgment agreements. *See supra* ch. 6; Forms 6.37D–.37E.
  - Consider requesting a deferred entry-of-judgment agreement, with dismissal or reduction of charges contingent on the client's compliance with specified conditions.
  - Determine if the jurisdiction has a formal diversion program and find out the criteria for eligibility.
  - Consider arguing that the client should be eligible because of extenuating circumstances.
  - Absent a formal diversion program, determine whether the district attorney or judge would be willing to consider a suggested program.
  - Seek the agreement of the prosecutor and the court to adjourn the case for a period of time, with the understanding that the case will be dismissed or reduced if there are no further violations or complaints during the time period (diversion or deferral).
  - Consider having the client promise to do certain things as part of the agreement (e.g., pay child support or other court obligations, find a job, obtain chemical dependency counseling, return to school).
- Consider the ordinance alternative. If there is a city or county ordinance to which the charge might be reduced, consider having the client offer a guilty or no-contest plea to the ordinance violation. A particular attraction of this alternative is the value to the city or county coffers.
- Consider restitution.
  - Ascertain whether the district attorney and court will consider dropping or reducing a charge if restitution has been paid.
  - If the client can obtain some or all of the restitution money in advance, hold the funds in your trust account and consider using them as an inducement to negotiation.
  - If the client is unable to provide total restitution immediately, consider a payment plan as part of a deferred judgment agreement. *See supra* ch. 6; Forms 6.37D–.37E.

☐ In appropriate cases, seek alternatives to a sentence of incarceration:

- Restitution
- Community service
- Probation

  - Work release
  - Electronic monitoring or day reporting

☐ Try to influence the PSI report.

- Provide the writer of the PSI report with appropriate helpful information. Specifically address factors that are listed in the DOC's Bifurcated Sentence Recommendation Grid. *See infra* app. C, Pre-Sentence Investigation Recommendation Guidance to Agents of the Division of Community Corrections. Assist the client in gathering and preparing this information. Have the information edited and typed to make it easier for the PSI report writer to read. PSI report writers usually want the following information:
  - An autobiographical sketch of the client;
  - The client's statement of his or her participation in the offense; and
  - A list of references the PSI report writer can contact.
- Prepare the client, the client's family and employer, and others for questioning by the PSI report writer.
- Consider providing an alternative PSI report. Employ a social worker, psychiatrist, or psychologist to test the client and write a report for the court that proposes an alternative to incarceration.

  Practice Tip. If there is any possibility that the client will seek to appeal or otherwise challenge the judgment of conviction, do not include any statements of the client about the offense in the defense PSI report. *See State v. Greve*, 2004 WI 69, ¶¶ 2, 40, 272 Wis. 2d 444, 681 N.W.2d 479 (holding that defendant's statements reported in defense report are admissible in a later trial).

☐ Examine the final PSI report carefully.

- Obtain a copy before the sentencing hearing and review it with the client.
- If there are any inaccuracies, attempt to have them corrected. If necessary, request an adjournment of the sentencing hearing to obtain the proof necessary to rebut incorrect assertions contained in the PSI report.

☐ Prepare the client for the sentencing hearing.

- Make sure that the client will be appropriately dressed to show respect for the court and an appreciation of the seriousness of the situation. Advise the client on proper behavior at the hearing.
- Assist the client in preparing and rehearsing the allocution. A proper allocution should contain the following elements:

  - An acceptance of responsibility (if the client admits the conduct);
  - A statement of remorse expressing sincere sorrow for pain, suffering, and loss caused by the client's conduct; and
  - A statement of honest resolve never again to become involved in criminal activity.
- A plea for mercy may or may not be advisable as part of allocution; the attorney should advise the client in light of the sentencing philosophy and practices of the assigned judge.
- Prepare the client to answer the judge's questions humbly and, if appropriate, to explain the circumstances that led up to the crime (while accepting full responsibility).
- Instruct the client not to react inappropriately to any statements made by the victim, the victim's family, or others.
- Discuss the sentence with the client.
  - Remind the client of the maximum potential sentence.
  - Give the client the benefit of your experience by explaining what you anticipate as a sentence.
  - Discuss with the client your proposed sentencing strategy and any arguments in support of the sentence you intend to propose.
  - Discuss with the client the available sentencing alternatives. Explain the obligations the client would have to undertake in conjunction with the various alternatives.
  - Be realistic. Advise the client that there are no guarantees.
  - Resolve any disagreements with the client about the sentencing strategy before the hearing.
  - Attempt to persuade the client of the logic behind your tactics, but give great weight to the client's wishes regarding any unresolved issues.

☐ Plan for witnesses.

- If appropriate, plan to have family members testify on the client's behalf (e.g., the family needs the client for financial and emotional support; the client has been a good and conscientious parent and breadwinner; family members will assist the client to see that future trouble is avoided).
- If applicable, plan to bring in social workers, psychiatrists, or psychologists to testify that the client is receiving needed help and that crime is unlikely to recur.
- If possible, plan to bring in an employer to show that the client has a good work record and that a job is available.

  - If possible, plan to present additional character witnesses (e.g., ministers, coworkers, teachers, neighbors) to show that the community would suffer a loss if the client were incarcerated. If the client is involved in service to the community, bring in coworkers or supervisors.
  - Provide the court with written reports or letters from witnesses who are not available to appear in court. Hearsay is admissible, because the rules of evidence are not strictly applied to sentencing hearings. Wis. Stat. § 911.01(4)(c).
    - Solicit the letters of reference or recommendation in advance.
    - Tell the persons what options are available to the judge and ask them to write letters explaining who they are, what relationship they have to the client, and what they believe to be an appropriate disposition of the case and why. Explain that anecdotal information is very helpful.
    - Ask that the letters be addressed to the judge but sent to you.
    - Send the originals of the letters to the court, with copies to any PSI report writer and to the prosecutor.

☐ Adapt your sentencing strategy to the presiding judge.

  - Find out as much as possible about the judge’s sentencing practices and philosophy.
  - If the district attorney’s recommendations carry great weight with the judge, seek to have the district attorney join in a recommendation or at least remain silent.
  - If the judge typically considers an applicable sentencing guideline or a risk instrument, review how the guideline or instrument may be applied, prepare a draft of any applicable worksheet, and prepare to argue for consideration of factors that support a mitigated sentence under the guideline or instrument.

    Practice Tip. Defense attorneys should review applicable guidelines or risk instruments early in representation of clients. Thus, attorneys can advise clients on the types of accomplishments and activities (e.g., employment, education, treatment programs) that may affect the ultimate sentence.

  - Send a letter to the judge stating what you believe to be an appropriate sentence in the case and why. *See infra* Form 8.67A. Send a copy of the letter to the district attorney. *See* SCR 20:3.5(b).

V. Sample Letter in Support of Sentencing Recommendation [§ 8.67]

Commentary and Instructions for Form 8.67A

Form 8.67A Sample Letter in Support of Sentencing Recommendation (CRM-0122)

Form 8.67A, *infra*, is a sample letter in support of a sentencing recommendation on behalf of a defendant. Depending on the preference of the attorney and the sentencing judge, the attorney can convey the same information and arguments in the form of a memorandum rather than a letter.

The defense attorney has a statutory right to make a statement to the court before sentence is imposed. Wis. Stat. § 972.14(2). The defense also has the opportunity to present a sentencing memorandum. *State v. Perez*, 170 Wis. 2d 130, 141–42, 487 N.W.2d 630 (Ct. App. 1992) (implying that this opportunity is part of the due process right to be sentenced on the basis of accurate information). Many attorneys believe that judges have decided on the sentence before the sentencing hearing actually occurs. Thus, a written recommendation, presented before the hearing, may be more effective than an oral argument.

The contents of the letter or memorandum will depend not only on the facts of the specific case, but also on the other information available to the judge and the judge's sentencing practices. For example, if the sentencing judge places great emphasis on the defendant's employment status, the attorney would emphasize that factor in the letter. The attorney should submit supporting materials with the letter, such as correspondence from employers, treatment records, and character references.

A written sentencing recommendation is not necessarily helpful in every case. For instance, if the judge routinely follows plea agreements, a letter or memorandum would not be necessary when the parties have agreed on a recommended sentence.

In some cases, particularly those involving felonies in which no agreement exists on sentencing, the defense may wish to present its own PSI report. The attorney should consider having a social worker with experience in corrections prepare this report. The attorney should be mindful, however, that any statements of the defendant that are included in the report can be used against the defendant in a later trial. *See State v. Greve*, 2004 WI 69, ¶¶ 2, 40, 272 Wis. 2d 444, 681 N.W.2d 479.

Distribution

Original:	Sentencing judge
Copy:	District attorney; client; client file

Notes

Form 8.67A Sample Letter in Support of Sentencing Recommendation (CRM-0122)

March 27, 2020

Hon. Jane Judgment
Circuit Court, Branch 0
Dane County Courthouse
Madison, WI 53701

Re: *State v. Eugene Pool*, Case No. 13 CF 621

Dear Judge Judgment:

Please accept this letter as defense counsel's sentencing recommendation in the above referenced case. Please find the following enclosures submitted in support of this recommendation: letter from Lisa Carr (Mr. Pool's supervisor at Northern Machinery), discharge summary from St. Martin's Hospital's AODA treatment program, and receipt for $600 paid by Mr. Pool in restitution.

Mr. Pool pleaded guilty on March 5, 2020, to one count of burglary in violation of Wis. Stat. § 943.10(1). Two other counts of burglary were read into the record and dismissed pursuant to plea negotiations. Mr. Pool admits his participation, along with three co-defendants, in all three burglaries. The burglaries all occurred at private residences between October 7 and October 15, 2019. Mr. Pool accepts the description of the burglaries contained in the criminal complaint.

My recommendation is that the court withhold sentence and place Mr. Pool on probation for three years. Conditions of probation should include restitution of $2,420, participation in counseling or treatment for depression, and 100 hours of community service work.

Mr. Pool is an excellent candidate for probation. His employment, completion of AODA treatment, law-abiding behavior while on bond, and remorse for his offense are major factors supportive of probation. As the enclosed letter from Ms. Carr states, Mr. Pool has worked at Northern Machinery as an assembly-line worker since October 2017. Because of Mr. Pool's positive work record, the company kept his job open for him while he was incarcerated and in the inpatient treatment center.

The enclosed discharge summary from St. Martin's Hospital shows that Mr. Pool successfully completed inpatient AODA treatment on February 19, 2020. He currently attends AA meetings and maintains sobriety. His neighbor, Kevin Washington, attends meetings with Mr. Pool and serves as his sponsor.

After his arrest on October 19, 2019, Mr. Pool spent four days in jail. On October 22, 2019, he was released on a personal recognizance bond. While on bond, Mr. Pool has been a law-abiding citizen. In addition to maintaining employment and completing inpatient treatment, Mr. Pool has started to pay restitution (see enclosed receipt for $600). The partial restitution payment reflects Mr. Pool's remorse for his criminal conduct and his wish to make amends to the victims.

Mr. Pool has suggested performing community service work at the Samaritan Nursing Home, where his great-aunt is a resident. The director of the nursing home has agreed that Mr. Pool could perform community service through such activities as reading to residents, helping in the kitchen, and mowing the lawn.

In light of the above factors, additional incarceration is not only unnecessary, but would be counterproductive. The four days of incarceration after his arrest were sufficient to get Mr. Pool's attention and deter him from further criminal conduct. The felony conviction, Mr. Pool's first, constitutes another serious consequence arising from this case. Also, a withheld sentence provides the court with strong leverage (the ability to impose a bifurcated sentence of imprisonment and extended supervision) if Mr. Pool violates the conditions of probation.

By copy of this letter and the enclosures, I am advising the district attorney of my recommendation in the above case. Thank you for considering these materials.

Sincerely,

____
Lawrence Lawyer
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. 0000000

Enclosures

cc: District Attorney
Eugene Pool

VI. Motion for Sentence Credit [§ 8.68]

Commentary and Instructions for Form 8.68A

Form 8.68A Motion for Sentence Credit (CRM-0123)

Form 8.68A, *infra*, is a motion seeking to have credit for predisposition incarceration applied to a sentence pursuant to Wis. Stat. § 973.155. This motion is directed to the circuit court. The motion should list the days spent in custody for which credit is sought, identifying the location of custody, and explain why the defendant is entitled to credit. Appropriate authorities should be cited in support of the motion. *See supra* §§ 8.25–.31 (overview of applicable law).

Sentence-credit issues are best dealt with at the original sentencing. Nevertheless, it is not unusual for such issues to come to the trial attorney's attention long after sentencing. The defendant can bring a motion for sentence credit in the circuit court at any time, even after the time for appeal has expired.

> ***Practice Tip.*** Many defense attorneys prefer to ask for jail credit after the court has announced the sentence. This tactic is common when the prosecution and the defense disagree about the appropriate sentence. By waiting to bring up the issue of jail credit, the defense attorney may avoid the possibility of the court imposing a longer sentence to compensate for the jail credit. The attorney can request a specific period of time, such as 30 days, to submit a memorandum to the court concerning the attorney's position on jail credit.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 8.68A Motion for Sentence Credit (CRM-0123)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ____________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION FOR SENTENCE CREDIT

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order granting credit toward the defendant's sentence for all days spent in custody in connection with the course of conduct for which the sentence was imposed. The defendant brings this motion pursuant to section 973.155 of the Wisconsin Statutes, and *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), *State v. Nyborg*, 122 Wis. 2d 765, 364 N.W.2d 553 (Ct. App. 1985), and *State v. Demars*, 119 Wis. 2d 19, 349 N.W.2d 708 (Ct. App. 1984).

IN SUPPORT, the defendant asserts that *(he/she)* is entitled to credit for the following days spent in custody, for which *(he/she)* has not been given credit:

(List days and location of custody and explain why
credit is appropriate, citing appropriate authorities.)

Dated: ____________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

VII. Motion to Set or Revise Restitution [§ 8.69]

Commentary and Instructions for Form 8.69A

Form 8.69A Motion to Set or Revise Restitution (CRM-0124)

Form 8.69A, *infra*, is a motion to set or revise restitution. The defense attorney should consider filing this motion whenever the amount or method of paying restitution is unsettled. This motion may be filed before or after sentencing. Wis. Stat. § 973.20 governs restitution. *See supra* §§ 8.47–.56 (overview of the applicable law).

At the hearing on this motion, the defense attorney should be prepared to present evidence on the following:

1. The defendant's resources and assets, level of education and training, employment history, present employment, prospects for future employment, and potential sources of income;

2. The needs and earning ability of the defendant's dependents;

3. Other competing demands on the defendant's income;

4. The potential for restitution from co-defendants; and

5. Challenges to the victim's claimed losses.

Victims often inflate their losses. The defense attorney should consider the possibility of investigating the claim by issuing subpoenas for receipts, appraisals, original vendor invoices, insurance documents and agents, or photographs. Comparison shopping for repair estimates or replacement items may also show that the amount of loss claimed is excessive. Co-defendants and police officers might also be valuable sources for information on items taken in the crime (whether or not seized by the police at the time of the arrest or search) or for original reports of loss.

At the hearing on a motion to set or revise restitution, the victim has the burden of establishing the amount of loss by a preponderance of the evidence. The defendant has the burden of establishing the defendant's financial resources, present and future earning ability, and the needs and earning ability of the defendant's dependents, by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a), (b).

Distribution

Original: E-file
Copy: Probation officer; client; client file

Notes

Form 8.69A Motion to Set or Revise Restitution (CRM-0124)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO *(SET/REVISE)* RESTITUTION

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order *(setting/revising)* the amount of restitution in this case. The defendant brings this motion pursuant to the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution; article I, sections 1, 7, 8, 9, 16, and 17 of the Wisconsin Constitution; sections 973.09 and 973.20 of the Wisconsin Statutes; and *Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978), and *State v. Pope*, 107 Wis. 2d 726, 321 N.W.2d 359 (Ct. App. 1982).

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

VIII. Motion to Remit Fines, Costs, Fees, and Surcharges (*Pedersen* Motion) [§ 8.70]

Commentary and Instructions for Form 8.70A

Form 8.70A Motion to Remit Fines, Costs, Fees, and Surcharges (CRM-0125)

Form 8.70A, *infra*, is a motion to remit fines, costs, fees, and surcharges. This motion is commonly called a *Pedersen* motion, after the case that challenged the statute allowing the court to imprison a defendant for failure to pay court-ordered obligations. Wis. Stat. § 973.07; *see State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 201 N.W.2d 778 (1972). The *Pedersen* court held that on request, an indigent defendant was entitled to an ability-to-pay hearing before being incarcerated for nonpayment of a fine. *Pedersen*, 56 Wis. 2d at 295–96; *see also In re Attorney Fees in State v. Helsper*, 2006 WI App 243, ¶¶ 7–16, 297 Wis. 2d 377, 724 N.W.2d 414 (interpreting Wis. Stat. § 973.07 to require consideration of defendant's ability to pay before court may order incarceration for nonpayment of attorney fees; noting U.S. Supreme Court precedent regarding constitutional requirements for recoupment of such fees).

A defendant may be imprisoned for up to six months for failure to pay surcharges applicable to ordinance and criminal violations, fines, costs, fees, or surcharges. Wis. Stat. § 973.07; *see also* Wis. Stat. §§ 814.75, 814.76 (list of surcharges applicable to criminal convictions); *infra* §§ 8.41–.46 (discussing costs, fees, and surcharges). Any such imprisonment may be consecutive to another term of incarceration. *State v. Way*, 113 Wis. 2d 82, 334 N.W.2d 918 (Ct. App. 1983).

To avoid imprisonment, the defendant must move for relief from the payment obligations. The basis for such a motion is his or her inability to pay. Although remission of the obligation is the most desirable form of relief (because it eliminates both the need to pay and the possibility of imprisonment), many courts are reluctant to completely negate a payment obligation. Thus, defense counsel should consider other alternatives to incarceration, including wage assignments, a schedule of partial payments, and community service. *See* Wis. Stat. §§ 973.05(1m), (2), (3), 973.06(2), (3). The court may also order a civil judgment for the unpaid amount. Wis. Stat. § 973.05(4)(a). These options may be the relief sought by this motion.

Attorneys should always advise clients to make all reasonable efforts to pay their court-ordered obligations. It is better to pay something than to pay nothing at all. Partial payment also increases the likelihood that a court will grant a motion such as Form 8.70A, *infra*.

At the hearing on this motion, defense counsel should be prepared to present evidence on (1) the client's resources and assets; (2) the client's level of education and training; (3) the client's employment history, present employment, prospects for future employment, and other potential sources of income; (4) the client's dependents' needs and earning ability; (5) other competing demands on the client's income; and (6) the potential for restitution from co-defendants.

The defendant probably bears the burden to establish his or her inability to pay a fine or costs. By analogy to Wis. Stat. § 973.20(14)(b), the burden of proof is most likely by a preponderance of the evidence. *Cf. Will v. State*, 84 Wis. 2d 397, 406–07, 267 N.W.2d 357 (1978) (holding that, if amount and payment schedule are reasonably set in light of defendant's financial means, defendant carries a "heavy burden" to show inability to pay). If the defendant's failure to pay the court-ordered obligations is excusable because of poverty or some other reason, the defendant cannot be lawfully imprisoned. *Id.* at 403.

> ***Practice Tip.*** Some courts have given defendants credit toward monetary obligations for jail time served in lieu of payment. For example, a court might impose an alternate sentence of 10 days' imprisonment to "sit out" a $500 monetary obligation. Defense attorneys need to familiarize themselves with local practice. In some cases, defendants may be able to sit out multiple obligations concurrently or to sit out a monetary obligation concurrently with a sentence of imprisonment. However, one court has held that courts lack the authority to apply jail time toward satisfaction of court costs. *State v. Baker*, 2005 WI App 45, ¶ 13, 280 Wis. 2d 181, 694 N.W.2d 415.

Distribution

Original: E-file
Copy: Probation officer; client; client file

Notes

Form 8.70A Motion to Remit Fines, Costs, Fees, and Surcharges (CRM-0125)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO REMIT *(specify type of obligation)*

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court to remit the *(specify type(s) of obligation(s))* previously imposed in this case. The defendant brings this motion pursuant to the 5th, 6th, 8th, and 14th Amendments to the United States Constitution; article I, sections 1, 7, 8, 9, 16, and 17 of the Wisconsin Constitution; section*(s) (973.042,/973.043,/973.046,/973.05,/973.055,/973.057,/973.06,/and/973.07)* of the Wisconsin Statutes; and *Tate v. Short*, 401 U.S. 395 (1971), *Williams v. Illinois*, 399 U.S. 235 (1970), *Will v. State*, 84 Wis. 2d 397, 267 N.W.2d 357 (1978), and *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 201 N.W.2d 778 (1972).

AS GROUNDS, the defendant asserts that (he/she) is indigent and without the ability to pay the (specify type of obligation(s)) in this case.

Dated: ______________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

IX. Guilty Plea Questionnaire and Waiver of Rights (CR-227) [§ 8.71]

Commentary and Instructions for Form 8.71A

Form 8.71A	Guilty Plea Questionnaire and Waiver of Rights (CRM-0126)

Form 8.71A, *infra*, is a sample of the standard form currently provided by the Wisconsin Records Management Committee to be used when a defendant intends to enter a plea of guilty or no contest. The purpose of the form is to ensure that the defendant has been adequately advised by his or her attorney of the rights being waived and the consequences of a plea. This form and many other circuit court forms are downloadable from the Wisconsin Court System's website: https://www.wicourts.gov/forms1/circuit/index.htm (select form category "Criminal" and then "View all criminal forms").

In jurisdictions that do not use a form such as Form 8.71A, *infra*, counsel should nevertheless advise the client of the ramifications of a plea and of the rights being waived. *See supra* ch. 6 (Checklist for Advising the Client on the Plea Decision). When completing a form like Form 8.71A, *infra*, the defense lawyer must explain each of the statements to the client in terms he or she will understand. The attorney should also brief the client on the expectations of the judge who will take the plea. Some judges are satisfied if the defense stipulates that the criminal complaint or the testimony taken at the preliminary examination is a sufficient factual basis for the plea. Other judges insist that the defendant make an admission, on the record, of facts sufficient to support the plea.

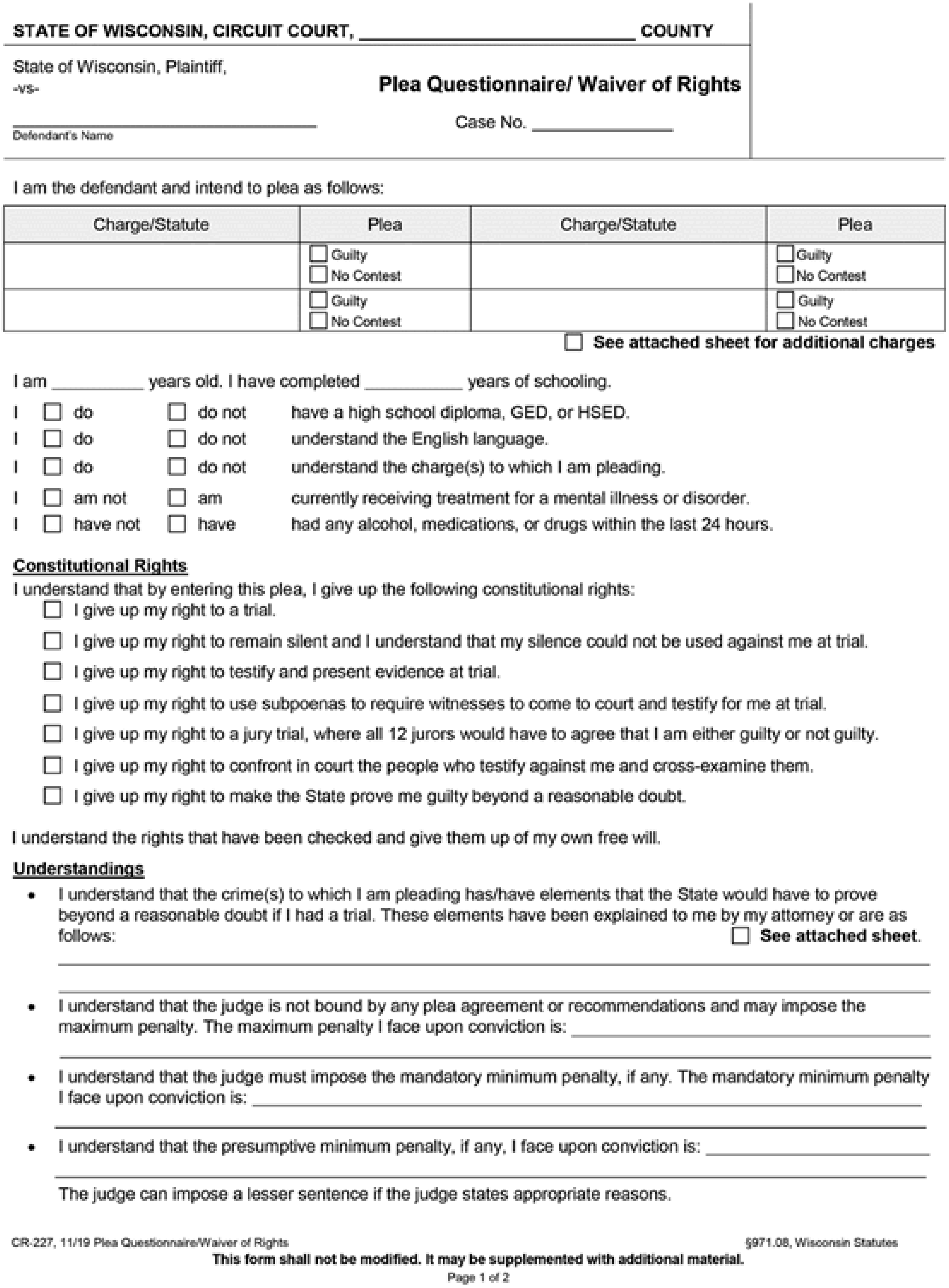
In addition to explaining the form, the attorney should reiterate that the decision to enter a plea is the client's alone and that the attorney cannot force the client to enter a plea. Signing the form does not commit the client to pleading guilty. The client has a right to change his or her mind up until the very last minute.

Distribution

Original:	File with the court
Copy:	Client; client file

Notes

Form 8.71A Guilty Plea Questionnaire and Waiver of Rights (CRM-0126)



STATE OF WISCONSIN, CIRCUIT COURT, ____________________________ COUNTY

State of Wisconsin, Plaintiff,
-vs-
____
Defendant's Name

Plea Questionnaire/ Waiver of Rights

Case No. _______________

I am the defendant and intend to plea as follows:

Charge/Statute	Plea	Charge/Statute	Plea
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest

☐ **See attached sheet for additional charges**

I am __________ years old. I have completed ___________ years of schooling.

I ☐ do ☐ do not have a high school diploma, GED, or HSED.
I ☐ do ☐ do not understand the English language.
I ☐ do ☐ do not understand the charge(s) to which I am pleading.
I ☐ am not ☐ am currently receiving treatment for a mental illness or disorder.
I ☐ have not ☐ have had any alcohol, medications, or drugs within the last 24 hours.

Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

☐ I give up my right to a trial.
☐ I give up my right to remain silent and I understand that my silence could not be used against me at trial.
☐ I give up my right to testify and present evidence at trial.
☐ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
☐ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
☐ I give up my right to confront in court the people who testify against me and cross-examine them.
☐ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

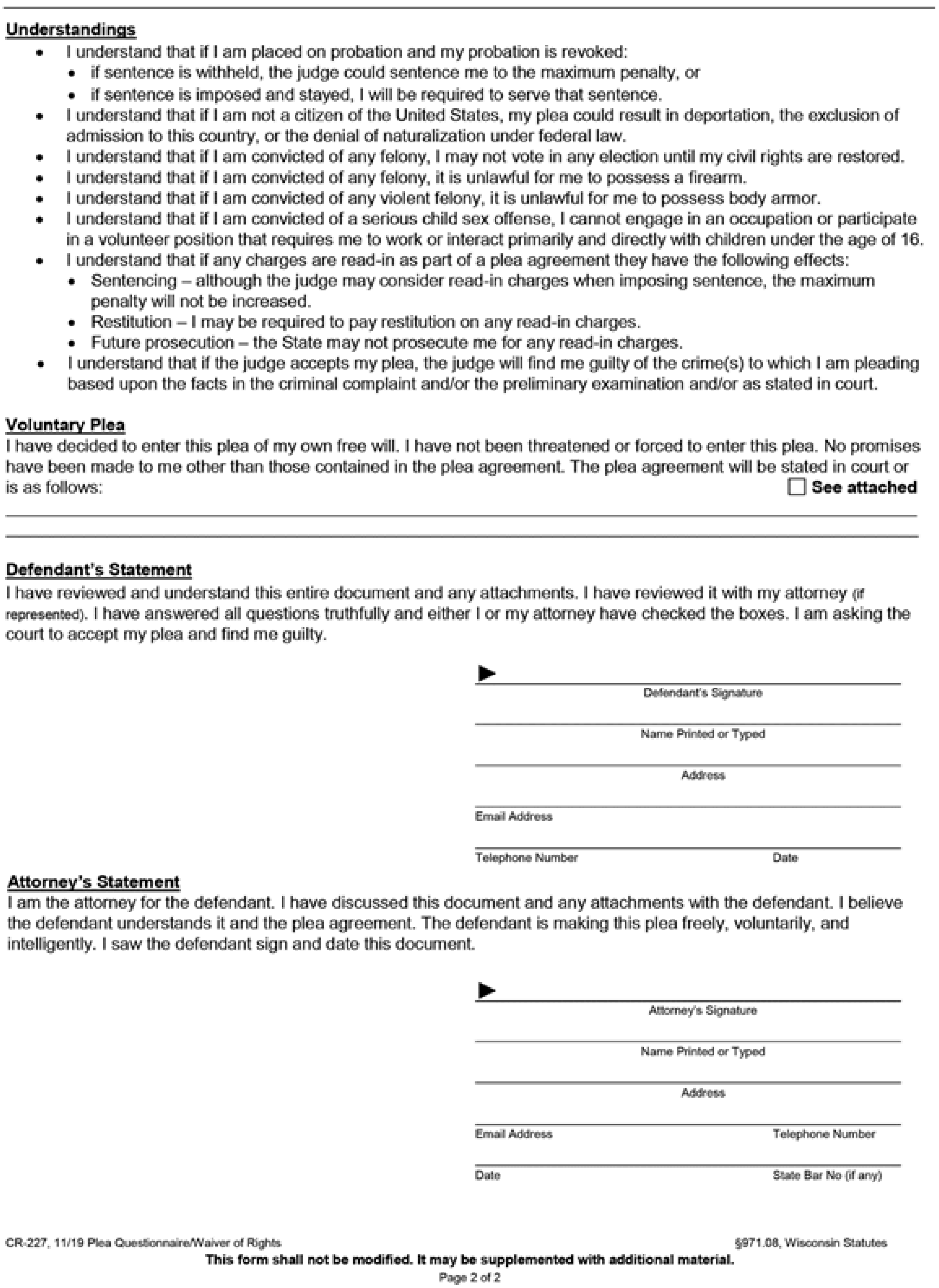
Understandings

- I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney or are as follows: ☐ **See attached sheet**.
  ____
  ____
- I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: ______________________________
  ____
- I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: ____
  ____
- I understand that the presumptive minimum penalty, if any, I face upon conviction is: __________________
  ____
  The judge can impose a lesser sentence if the judge states appropriate reasons.

CR-227, 11/19 Plea Questionnaire/Waiver of Rights §971.08, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 2



Understandings

- I understand that if I am placed on probation and my probation is revoked:
    - if sentence is withheld, the judge could sentence me to the maximum penalty, or
    - if sentence is imposed and stayed, I will be required to serve that sentence.
- I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.
- I understand that if I am convicted of any felony, I may not vote in any election until my civil rights are restored.
- I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm.
- I understand that if I am convicted of any violent felony, it is unlawful for me to possess body armor.
- I understand that if I am convicted of a serious child sex offense, I cannot engage in an occupation or participate in a volunteer position that requires me to work or interact primarily and directly with children under the age of 16.
- I understand that if any charges are read-in as part of a plea agreement they have the following effects:
    - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
    - Restitution – I may be required to pay restitution on any read-in charges.
    - Future prosecution – the State may not prosecute me for any read-in charges.
- I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.

Voluntary Plea

I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: ☐ **See attached**

Defendant's Statement

I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

▶
Defendant's Signature
Name Printed or Typed
Address
Email Address
Telephone Number Date

Attorney's Statement

I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document.

▶
Attorney's Signature
Name Printed or Typed
Address
Email Address Telephone Number
Date State Bar No (if any)

CR-227, 11/19 Plea Questionnaire/Waiver of Rights §971.08, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

X. Notice of Right to Seek Postconviction Relief (CR-233) [§ 8.72]

Commentary and Instructions for Form 8.72A

Form 8.72A Notice of Right to Seek Postconviction Relief (CRM-0127)

Form 8.72A, *infra*, is Circuit Court Form CR-233. This form and many other circuit court forms are downloadable from the Wisconsin Court System's website: https://www.wicourts.gov/forms1/circuit/index.htm (select form category "Criminal" and then "View all criminal forms"). The sentencing judge and the defense attorney must advise the convicted defendant of his or her right to appeal and of the time limits within which those rights must be exercised. *See* Wis. Stat. § 973.18. This form was devised to ensure that sentencing judges and attorneys fulfill this obligation. Wis. Stat. § 973.18 sets forth the division of responsibility between the court and the attorney in ensuring that the defendant understands the right to appeal and the applicable time limit.

In preparation for the sentencing hearing, the defense attorney should fully discuss the client's appeal rights and should offer his or her professional opinion of whether the client has any appealable issues and of the likelihood of success on appeal. The defense attorney should also explain that the right to appeal or file postconviction motions must be exercised by filing a notice of intent to pursue postconviction relief within 20 days after sentencing. *See* Wis. Stat. § 809.30(2)(b); *see also infra* Form 9.47A.

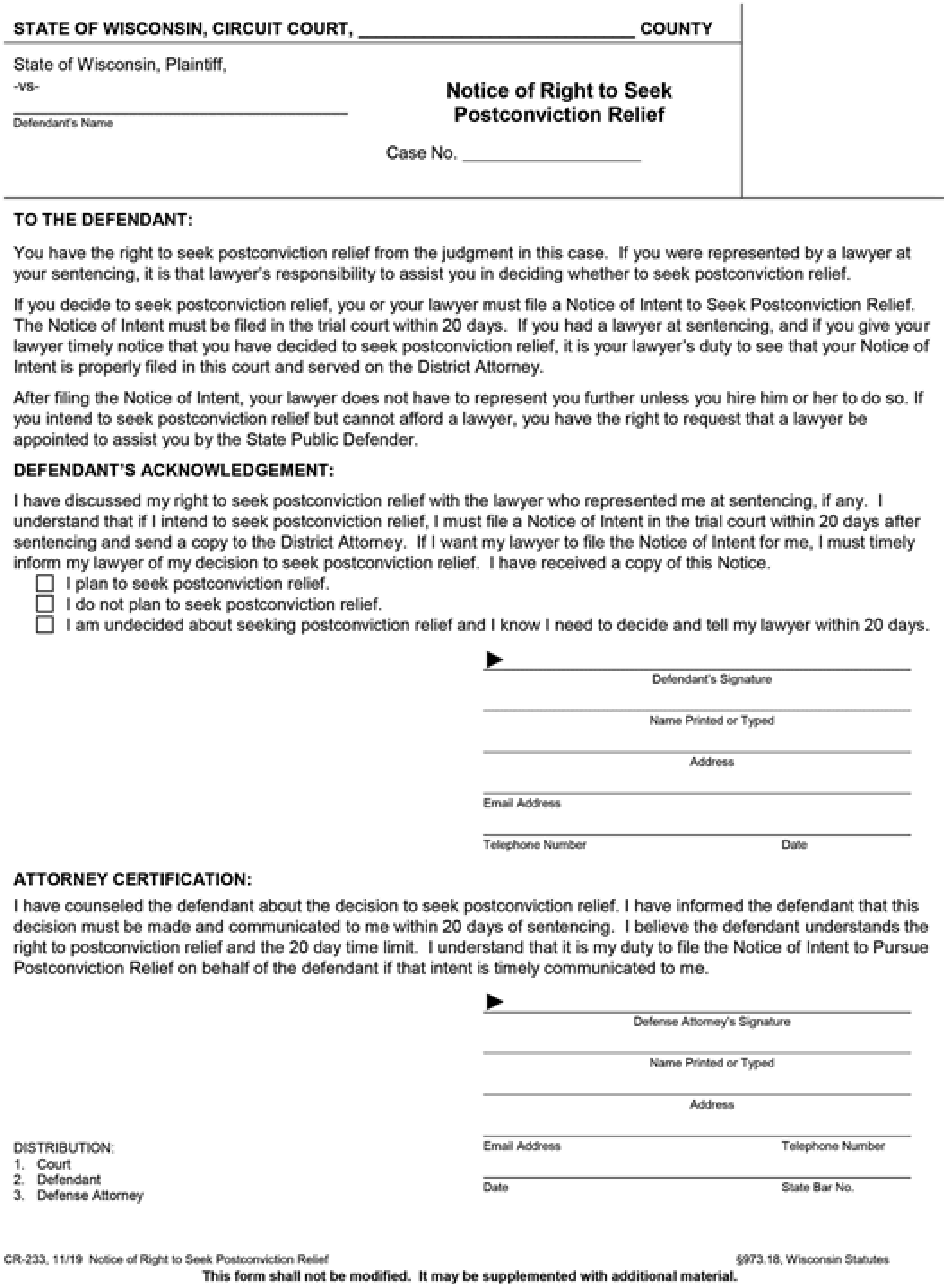
> ***Caution.*** Form 8.72A, *infra*, should *not* be confused with a notice of intent to pursue postconviction relief. *Completing and filing Form 8.72A (CR-233) does not protect the convicted defendant's right to appeal*. Further, even if he or she indicates a lack of intent to seek relief, the defendant nonetheless retains the right to file a timely notice of intent. Regarding preservation of appeal rights, see chapter 9, *infra*.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 8.72A Notice of Right to Seek Postconviction Relief (CRM-0127)



STATE OF WISCONSIN, CIRCUIT COURT, ______________________________ COUNTY

State of Wisconsin, Plaintiff,
-vs-
____
Defendant's Name

Notice of Right to Seek Postconviction Relief

Case No. ____________________

TO THE DEFENDANT:

You have the right to seek postconviction relief from the judgment in this case. If you were represented by a lawyer at your sentencing, it is that lawyer's responsibility to assist you in deciding whether to seek postconviction relief.

If you decide to seek postconviction relief, you or your lawyer must file a Notice of Intent to Seek Postconviction Relief. The Notice of Intent must be filed in the trial court within 20 days. If you had a lawyer at sentencing, and if you give your lawyer timely notice that you have decided to seek postconviction relief, it is your lawyer's duty to see that your Notice of Intent is properly filed in this court and served on the District Attorney.

After filing the Notice of Intent, your lawyer does not have to represent you further unless you hire him or her to do so. If you intend to seek postconviction relief but cannot afford a lawyer, you have the right to request that a lawyer be appointed to assist you by the State Public Defender.

DEFENDANT'S ACKNOWLEDGEMENT:

I have discussed my right to seek postconviction relief with the lawyer who represented me at sentencing, if any. I understand that if I intend to seek postconviction relief, I must file a Notice of Intent in the trial court within 20 days after sentencing and send a copy to the District Attorney. If I want my lawyer to file the Notice of Intent for me, I must timely inform my lawyer of my decision to seek postconviction relief. I have received a copy of this Notice.

☐ I plan to seek postconviction relief.
☐ I do not plan to seek postconviction relief.
☐ I am undecided about seeking postconviction relief and I know I need to decide and tell my lawyer within 20 days.

▶ ______________________________
Defendant's Signature

____
Name Printed or Typed

____
Address

____
Email Address

____
Telephone Number Date

ATTORNEY CERTIFICATION:

I have counseled the defendant about the decision to seek postconviction relief. I have informed the defendant that this decision must be made and communicated to me within 20 days of sentencing. I believe the defendant understands the right to postconviction relief and the 20 day time limit. I understand that it is my duty to file the Notice of Intent to Pursue Postconviction Relief on behalf of the defendant if that intent is timely communicated to me.

▶ ______________________________
Defense Attorney's Signature

____
Name Printed or Typed

____
Address

____
Email Address Telephone Number

____
Date State Bar No.

DISTRIBUTION:
1. Court
2. Defendant
3. Defense Attorney

CR-233, 11/19 Notice of Right to Seek Postconviction Relief §973.18, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Chapter 9

Postconviction Proceedings

I. Introduction [§ 9.1]

This chapter is a general reference guide for postconviction proceedings, focusing on the trial attorney's responsibilities in relation to preserving or protecting a client's postconviction or appellate rights. For a general guide to the appellate process in Wisconsin, see *Appellate Practice and Procedure in Wisconsin*, by Michael S. Heffernan (State Bar of Wis. 9th ed. 2022 & Supp.) (hereinafter Heffernan). The Wisconsin State Public Defender publishes and updates a handbook for postconviction practice and criminal appeals, including timelines, issues checklists, and more, available on the Appellate Division page of the Wisconsin State Public Defender's (SPD) website. *See* SPD, *Appellate Practice and Procedure for SPD-Appointed Counsel* (5th ed. 2021), https://www.wispd.gov/_files/ugd/ef2438_9aa74076116c4e25b4aa5fb787687aa1.pdf. It also maintains a searchable blog of recent and archived appellate decisions at Wis. State Pub. Defender, *On Point*, https://www.wisconsinappeals.net/ (last visited Sept. 19, 2024).[1]

Contemporary criminal law practice is typically a bifurcated practice. Representation of the criminal defendant at the trial level is almost always separate from representation on appeal. This separation arises from practical as well as legal considerations.

The convicted defendant often wants a new attorney on appeal. The defendant may be dissatisfied with the trial attorney's representation or with the results in the case; one of the issues on appeal may even be the trial attorney's effectiveness. The defendant may have run out of funds and, therefore, may need to seek the appointment of counsel by the court or by the SPD.

Although the trial attorney is unlikely to represent the defendant on appeal, the trial attorney is responsible for protecting the defendant's appeal rights. *See generally State v. Raye*, 2005 WI 68, ¶ 24, 281 Wis. 2d 339, 697 N.W.2d 407 (issues not preserved for appeal are considered forfeited). The trial attorney should be mindful of this responsibility from the very first court appearance. After conviction and sentencing, the attorney must continue representing the defendant until the defendant decides whether to pursue postconviction remedies. The trial attorney also has the duty to explain to the defendant the right to seek postconviction relief, and both the attorney and the defendant must execute circuit court form CR-233, Notice of Right to Seek Postconviction Relief. *See* Wis. Stat. § 973.18; *State v. Argiz*, 101 Wis. 2d 546, 556–58, 305 N.W.2d 1 (1981); *Whitmore v. State*, 56 Wis. 2d 706, 719, 203 N.W.2d 56 (1973); *see also supra* Form 8.72A.

The trial attorney's responsibilities for protecting the defendant's appeal rights include the following:

1. Perfecting the record and preserving error by (a) making timely objections and offers of proof; (b) bringing appropriate pretrial motions; and (c) making sure a complete record is made of all conferences held in chambers, at the bench, or "off the record";

2. Informing the defendant of the right to appeal, *State ex rel. Flores v. State*, 183 Wis. 2d 587, 603–05, 516 N.W.2d 362 (1994) (holding that circuit court and defense attorney share this responsibility);

3. Bringing appropriate motions between entry of the plea (or verdict of guilt) and sentencing and, if the defendant wishes to pursue further postconviction remedies or to appeal, filing a notice of intent to seek postconviction relief, after sentencing, in the circuit court, *see* Wis. Stat. § 809.30; *infra* Form 9.47A;

4. If the defendant is incarcerated, bringing a motion for release pending appeal, if appropriate, *see infra* Form 9.51A; and

5. Informing the defendant of the importance of responding promptly to requests for information from the SPD Appellate Division.

Item 1 above is discussed in chapter 5 (Bringing Pretrial Motions), *supra*. This chapter covers items 2 through 5. The procedures for filing a notice of intent to pursue postconviction relief, initiating an appeal, and bringing postsentencing motions are summarized in the Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30, *infra* §§ 9.2–.7. Common postconviction motions and writs are discussed in the Quick Reference Guide to Postconviction Motions and Writs, *infra* §§ 9.8–.42. The chapter also provides petitions for writs of habeas corpus (*infra* Form 9.45A) and certiorari (*infra* Form 9.46A), a Notice of Intent to Pursue Postconviction Relief (*infra* Form 9.47A), and other common postconviction pleadings, including proceedings to modify the length or conditions of sentences.

The trial attorney's representation usually concludes with the filing of the notice of intent to pursue postconviction relief, which must be done within 20 days after sentencing. After entry of the plea or verdict of guilt, the trial attorney generally should bring only those motions that will be decided *before* sentencing, leaving postsentencing motions and the appeal to the appellate attorney. The trial attorney must be certain to address sentence credit and restitution. If a defendant wishes to pursue postconviction relief from the judgment, the trial attorney should be careful to timely file the notice (from the date of sentencing), even if a restitution hearing is scheduled more than 20 days after sentencing.

II. Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30 [§ 9.2]

A. The Right to Seek Postconviction Relief [§ 9.3]

The right to seek postconviction relief encompasses the right to bring postconviction motions in the circuit court and the right to appeal. Wis. Stat. § 809.30 spells out the procedures for both courses of action. The trial judge must inform the defendant at sentencing of the right to seek postconviction relief under Wis. Stat. § 809.30 and, if the defendant is indigent, of the right to the assistance of the SPD or court-appointed counsel. *See* Wis. Stat. § 973.18(2); *State ex rel. Flores v. State*, 183 Wis. 2d 587, 603–04, 516 N.W.2d 362 (1994). Wis. Stat. § 809.30(1)(c) defines *postconviction relief* as "an appeal or a motion for postconviction relief in a criminal case, other than an appeal, motion, or petition under [Wis. Stat. §§] 302.113(7m) or (9g), 973.19, 973.195, 973.198, 974.06, or 974.07(2)."

B. Notice of Intent to Seek Relief [§ 9.4]

Within 20 days after the date of sentencing or final adjudication, a defendant seeking postconviction relief must file in the circuit court a notice of intent to pursue postconviction relief. Wis. Stat. § 809.30(2)(b); *see infra* Form 9.47A. The court of appeals may grant extensions of time under Wis. Stat. § 809.82(2)(a), *see, e.g.*, *State v. Harris*, 149 Wis. 2d 943, 946–47, 440 N.W.2d 364 (1989); *State v. Quackenbush*, 2005 WI App 2, ¶ 22, 278 Wis. 2d 611, 692 N.W.2d 340, though excessive or inexcusable delay may amount to ineffective assistance of counsel, *see State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 44 & n.12, 354 Wis. 2d 626, 847 N.W.2d 805.

The attorney who represented the defendant at sentencing must continue the representation by filing the notice of intent, unless the attorney has been discharged by the defendant or the circuit court. Wis. Stat. § 809.30(2)(a).

C. Appointment of Counsel [§ 9.5]

If the defendant requests representation by the SPD, the clerk of the circuit court must send the SPD a copy of the notice of intent within five days after the notice is filed. Wis. Stat. § 809.30(2)(c)1. If the SPD represented the defendant at trial, the district attorney may request a redetermination of financial eligibility within five days after the notice of intent is filed and served. Wis. Stat. § 809.30(2)(d).

The SPD must appoint an attorney within 30 days after the filing of the notice of intent, unless financial eligibility must be determined or redetermined or the SPD moves to extend the time for appointment. In this case, an attorney must be appointed within 50 days. Wis. Stat. § 809.30(2)(e); *see infra* §§ 10.3–.7 (eligibility determination).

If a defendant is financially ineligible for public defender representation, the defendant may still be considered constitutionally indigent and entitled to appointment of postconviction counsel at county expense. *See State v. Nieves-Gonzalez*, 2001 WI App 90, ¶ 7, 242 Wis. 2d 782, 625 N.W.2d 913; *State v. Dean*, 163 Wis. 2d 503, 513, 471 N.W.2d 310 (Ct. App. 1991).

D. Transcripts and Circuit Court Case Records [§ 9.6]

The defense must order a copy of the circuit court record and transcripts of the reporter's notes within 30 days after the filing of the notice of intent, within 50 days if financial eligibility must be determined or redetermined, or within 90 days if the defendant requests a public defender and is denied. Wis. Stat. § 809.30(2)(e), (f); *see infra* §§ 10.3–.7 (eligibility determination). The circuit court clerk must serve the defendant with a copy of the record within 60 days after the request, and the court reporter has the same 60 days after a request to file the transcript with the circuit court and serve a copy on the defendant. Wis. Stat. § 809.30(2)(g)1., 2.

Service of the court record and transcripts is now accomplished through the e-filing system, per Wis. Stat. § 801.18(9)(b), although certain parts of the record not subject to e-filing (e.g., a recording on a compact disc), will still have to be served by mail. Thus, it is important that a defense attorney promptly opt-in to the e-filing system in order to be granted electronic access to transcripts and the record.

> ***Caution.*** Defense counsel must keep track of the reporters' deadline because it is not always met. Counsel should contact a delinquent reporter and may wish to encourage him or her to request an extension of the deadline from the Wisconsin Court of Appeals under Wis. Stat. § 809.82(2)(a). In cases of extreme delay, a defense attorney may be forced as a last resort to move the Wisconsin Court of Appeals for sanctions under Wis. Stat. § 809.11(7)(d) to safeguard the defendant's appellate rights.

E. Filing of Notice of Appeal or Motion for Postconviction Relief [§ 9.7]

A motion for postconviction relief or notice of appeal must be filed within 60 days after the service of the last transcript or the circuit court case record, whichever occurs later. Wis. Stat. § 809.30(2)(h). The defense may move the court of appeals to extend this deadline pursuant to Wis. Stat. § 809.82(2)(a).

The defendant may file a motion for postconviction relief in place of, or as a prelude to, a notice of appeal. Heffernan, *supra* § 9.1, ch. 19 (citing Wis. Stat. § 809.30(2)(h)). Postconviction motions need not be brought before an appeal if the grounds are sufficiency of the evidence or issues previously raised. Wis. Stat. §§ 974.02(2), 809.30(2)(h). Issues not previously raised, however, such as newly discovered evidence, ineffective representation by counsel, or challenges to the sentence, must be raised by postconviction motion before appeal. Heffernan, *supra* § 9.1, ch. 19.

Postconviction motions under Wis. Stat. § 809.30 serve two purposes: (1) presenting issues to the circuit court that were not previously raised; and (2) further developing the record and allowing the circuit court another chance to consider issues previously raised. *Id.*

Within 60 days after the filing of a motion for postconviction relief, the circuit court must determine the motion and issue an order, or the motion is considered to be denied. Wis. Stat. § 809.30(2)(i). The court of appeals may extend this time limit on the request of either party or the circuit court. Wis. Stat. § 809.30(2)(i). If the postconviction motion is denied or deemed denied, the defendant may appeal both the denial and the conviction or the conviction alone. *See* Wis. Stat. § 809.30(2)(j). The defense must file its notice of appeal in the circuit court within 20 days after the entry of the order on the postconviction motion. *Id.*

III. Quick Reference Guide to Postconviction Motions and Writs [§ 9.8]

A. Common Wis. Stat. § 809.30 Postconviction Motions [§ 9.9]

1. Motion for a New Trial (Form 9.48A) [§ 9.10]

A motion for a new trial asks the circuit court to set aside the conviction and order a new trial.

> ***Caution.*** The trial attorney generally should not file any postconviction motion or other motion or writ without consulting an attorney experienced in criminal appeals. The actions that a trial attorney should take are generally limited to those described in section 9.1, *supra*, most importantly the filing of a notice of intent to pursue postconviction relief if the defendant wishes to pursue an appeal.

Motions for a new trial are usually based on the following grounds:

1. Errors committed during the trial;
2. Sufficiency of the evidence, i.e., the verdict is not supported by the evidence or is contrary to law;
3. The interests of justice; or
4. Newly discovered evidence, i.e., new evidence has come to light that would probably have caused a different result.

Newly discovered evidence does not warrant a new trial unless the evidence meets, at a minimum, the following criteria:

1. The evidence must have come to the moving party's knowledge after the trial.
2. The moving party must not have been negligent in seeking to discover the evidence.
3. The evidence must be material to the outcome of the case.
4. The testimony must not merely be cumulative to testimony that was introduced at trial.
5. The new evidence must create a reasonable probability that a different result would be reached on a new trial.

See, e.g., *State v. Armstrong*, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 746 N.W.2d 590. If the newly discovered evidence presented after sentencing is a witness's recantation of testimony, other newly discovered evidence must corroborate the recantation. *State v. McCallum*, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997); *cf. State v. Kivioja*, 225 Wis. 2d 271, 293–96, 592 N.W.2d 220 (1999) (modifying *McCallum* requirements when motion is brought before sentencing).

2. Motion to Withdraw Guilty or No-Contest Plea (Form 9.49A) [§ 9.11]

A motion to withdraw a guilty or no-contest plea asks the circuit court to set aside a conviction and allow the defendant to withdraw the plea. *See* Wis. Stat. § 971.08.

The defense may make this motion either before or after sentencing. Circuit courts may, however, consider untimely motions to withdraw a plea. *State v. Lee*, 88 Wis. 2d 239, 276 N.W.2d 268 (1979). Before sentencing, the circuit court should allow plea withdrawal for "any fair and just reason," unless the prosecution will be substantially prejudiced. *See, e.g.*, *State v. Jenkins*, 2007 WI 96, ¶ 28, 303 Wis. 2d 157, 736 N.W.2d 24; *State v. Bollig*, 2000 WI 6, ¶ 28, 232 Wis. 2d 561, 605 N.W.2d 199. *But see Jenkins*, 2007 WI 96, ¶¶ 43–44, 303 Wis. 2d 157 (holding that defendant faces significant obstacles in seeking to withdraw plea, as discussed further in section 9.49, *infra*).

Motions brought after sentencing to withdraw a plea generally should only be filed by postconviction or appellate counsel. These motions are subject to the requirement that the defendant show, by clear and convincing evidence, a "manifest injustice." *See, e.g.*, *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Hampton*, 2004 WI 107, ¶ 60, 274 Wis. 2d 379, 683 N.W.2d 14.

The defendant may make a motion to withdraw a plea on the ground of manifest injustice based on facts such as the following:

1. The defendant was denied effective assistance of counsel guaranteed by the constitution, statute, or rule. *See State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); *see also State v. Kelty*, 2006 WI 101, ¶ 43, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. McNeil*, 155 Wis. 2d 24, 454 N.W.2d 742 (1990), *aff'd*, 501 U.S. 171 (1991); *State v. Milanes*, 2006 WI App 259, ¶ 13, 297 Wis. 2d 684, 727 N.W.2d 94.
2. The plea was involuntary or was entered without knowledge of the charge, the possible sentence, or other information that should have been provided as part of the court's plea colloquy. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Lackershire*, 2007 WI 74, ¶ 47, 301 Wis. 2d 418, 734 N.W.2d 23, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835; *Brown*, 2006 WI 100, ¶¶ 19–21, 293 Wis. 2d 594; *State v. Bangert*, 131 Wis. 2d 246,

389 N.W.2d 12 (1986). *But cf. State v. Taylor*, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482 (under specific facts of case, when record indicated defendant had notice of actual penalty, court's failure to discuss additional two-year repeater penalty enhancer at plea hearing was deemed an insubstantial defect and *Bangert* hearing was not required); *State v. Plank*, 2005 WI App 109, ¶¶ 12–17, 282 Wis. 2d 522, 599 N.W.2d 235 (holding that court need not inform defendant that Truth in Sentencing entails serving entire term of confinement in prison); *State v. Dugan*, 193 Wis. 2d 610, 622, 534 N.W.2d 897 (Ct. App. 1995) (holding that circuit court need not advise defendant of potential that restitution will be ordered in accepting a plea).

3. The plea was not entered or ratified by the defendant or a person authorized to so act on the defendant's behalf. *See Bangert*, 131 Wis. 2d 246.

4. The prosecution materially breached the plea agreement. *See, e.g.*, *State v. Matson*, 2003 WI App 253, ¶ 27, 268 Wis. 2d 725, 674 N.W.2d 51; *State v. Smith*, 153 Wis. 2d 739, 451 N.W.2d 794 (Ct. App. 1989).

5. The plea agreement was premised on a legal impossibility. *See State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992).

6. There was direct judicial participation in plea negotiations, which creates a conclusive presumption that the defendant's plea was involuntary. *State v. Williams*, 2003 WI App 116, ¶ 1, 265 Wis. 2d 229, 666 N.W.2d 58. This presumption did not apply, however, to a judge's comments encouraging the defendant to plead guilty "to get some credit and in other words to catch a break," when the judge was not participating in formal negotiations. *State v. Hunter*, 2005 WI App 5, ¶¶ 2, 7, 278 Wis. 2d 419, 692 N.W.2d 456.

7. There was an insufficient factual basis to establish that the defendant committed the offense. *See, e.g.*, *Lackershire*, 2007 WI 74, ¶ 67, 301 Wis. 2d 418 (holding that factual basis relied on by circuit court raised substantial question about defendant's guilt); *State v. Johnson*, 207 Wis. 2d 240, 243–45, 558 N.W.2d 375 (1997) (holding that undisputed facts did not constitute the crime in question).

8. The court failed to advise the defendant of the potential for deportation, as required by Wis. Stat. § 971.08(1)(c), and the defendant later shows that deportation is a likely result of the conviction, subject to a harmless-error analysis of whether the defendant was nonetheless aware of the potential immigration consequences of the plea when the defendant entered the plea. *See, e.g.*, Wis. Stat. § 971.08(2); *State v. Reyes Fuerte*, 2017 WI 104, ¶¶ 36, 38–40, 378 Wis. 2d 504, 904 N.W.2d 773 (overruling *State v. Douangmala*, 2002 WI 62, ¶ 23, 253 Wis. 2d 173, 646 N.W.2d 1).

A circuit court's decision on whether to allow a plea withdrawal will be reviewed for an erroneous exercise of discretion. *State v. Roou*, 2007 WI App 193, ¶ 13, 305 Wis. 2d 164, 738 N.W.2d 173.

By statute and case law, circuit courts must conduct extensive colloquies with defendants before accepting their pleas of guilty or no contest. *See, e.g.*, Wis. Stat. § 971.08; *State v. Howell*, 2007 WI 75, ¶ 26 nn.12–13, 301 Wis. 2d 350, 734 N.W.2d 48; *Brown*, 2006 WI 100, ¶¶ 34–36, 293 Wis. 2d 594. The purposes of the required colloquy include ensuring that the defendant understands the nature of the charges, the potential punishment, and the constitutional rights waived by pleading guilty or no contest. *See, e.g.*, Wis. Stat. § 971.08; *Howell*, 2007 WI 75, ¶ 26, 301 Wis. 2d 350.

A motion to withdraw a plea because of a defect in the plea colloquy is often called a *Bangert* motion, referring to the 1986 case mandating an earlier version of the colloquy presently required. *See State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The motion must not only include a prima facie showing that the plea colloquy was defective, but also allege that the defendant did not know or understand the information that was omitted or incompletely explained. *See, e.g.*, *Howell*, 2007 WI 75, ¶ 7, 301 Wis. 2d 350; *Bangert*, 131 Wis. 2d at 274. If the motion satisfies these two requirements, the court must conduct an evidentiary hearing at which the prosecution must show that the defendant entered the plea knowingly and voluntarily. *See, e.g.*, *Howell*, 2007 WI 75, ¶ 29, 301 Wis. 2d 350 (citing *Bangert*, 131 Wis. 2d at 274–75).

The Wisconsin Supreme Court has rejected a formalistic application of the duties mandated in Wis. Stat. § 971.08, emphasizing that the courts need not hold a hearing for "insubstantial defects" in the plea colloquy. *See Taylor*, 2013 WI 34, 347 Wis. 2d 30. In *Taylor*, the supreme court upheld the denial of a *Bangert* hearing, emphasizing that the *record* indicated the defendant had been informed of the correct penalty, thus, the circuit court's failure at the plea hearing to refer to the two-year penalty enhancer did not automatically render the plea not knowing, intelligent, and voluntary. *Id.* ¶ 53.

Despite an adequate plea colloquy, a defendant may bring a motion to withdraw a guilty or no-contest plea because of extrinsic factors, such as coercion or ineffective assistance of counsel. *See Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350. This type of motion is often called a *Nelson/Bentley* motion, after the cases *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). An evidentiary hearing is not required if the defendant fails to allege sufficient specific facts that, if true, would provide a basis for relief. *Howell*, 2007 WI 75, ¶ 76, 301 Wis. 2d 350. If the allegations meet this test, the court must hold an evidentiary hearing unless the record conclusively shows that the defendant is not entitled to relief. *Id.* ¶ 77.

3. Motions Addressing Sentence [§ 9.12]

a. Sentence Modification (Form 9.50A) [§ 9.13]

A motion to modify sentence asks the circuit court to change the length of the sentence, the nature of the sentence (e.g., incarceration to probation), or the conditions of the sentence (usually onerous conditions of probation).

Such motions are most commonly filed by the postconviction attorney by way of the Wis. Stat. § 809.30 direct appeal process. However, a "new factor"-based motion may be filed even after the section 809.30 deadline expires. *State v. Noll*, 2002 WI App 273, ¶ 12, 258 Wis. 2d 573, 653 N.W.2d 895. A motion to modify sentence must be raised in the circuit court; it cannot be raised for the first time in the court of appeals. *See* Wis. Stat. § 974.02(2); *State v. Walker*, 2006 WI 82, ¶ 37, 292 Wis. 2d 326, 716 N.W.2d 498 (holding that this requirement applies after resentencing).

Courts have inherent authority to modify a sentence, at any time, on the basis of a "new factor." *State v. Trujillo*, 2005 WI 45, ¶ 10, 279 Wis. 2d 712, 694 N.W.2d 933, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828; *see Cresci v. State*, 89 Wis. 2d 495, 503, 278 N.W.2d 850 (1979). The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. *Harbor*, 2011 WI 28, ¶¶ 35–52, 333 Wis. 2d 53 (applying definition of *new factor* from *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), and withdrawing language from *State v. Michels*, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), which had suggested that any alleged new factor must frustrate purpose of original sentence). The defendant must also demonstrate that the new factor justifies modification of the sentence. *Id.* ¶ 37. If the court determines the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor. *Id.* ¶ 38.

A *new factor* is a fact or set of facts highly relevant to the imposition of sentence, but not known to the circuit court at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all parties. *See, e.g.*, *id.* ¶¶ 40–52.

A legislative reduction of the statutory maximum sentence is not a new factor. *Trujillo*, 2005 WI 45, ¶ 25, 279 Wis. 2d 712; *State v. Hegwood*, 113 Wis. 2d 544, 335 N.W.2d 399 (1983); *cf.* Wis. Stat. § 973.195(1r)(b) (change in sentencing law may be the basis for a sentence-adjustment petition). Further, the alleged failure of the Department of Corrections (DOC) to provide proper medical treatment is not a new factor. *State v. Johnson*, 210 Wis. 2d 196, 204–05, 565 N.W.2d 191 (Ct. App. 1997). Medical or special treatment needs, a positive adjustment to the prison setting, a change in the defendant's attitude, or an assault while in prison are not new factors. *State v. Crochiere*, 2004 WI 78, ¶¶ 22–23, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶ 40–52, 333 Wis. 2d 53; *State v. Kluck*, 210 Wis. 2d 1, 7–8, 563 N.W.2d 468 (1997); *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981); *State v. Klubertanz*, 2006 WI App 71, ¶¶ 1, 44, 291 Wis. 2d 751, 713 N.W.2d 116 (holding that sexual assault committed against defendant while in prison was not a new factor); *State v. Champion*, 2002 WI App 267, ¶ 6, 258 Wis. 2d 781, 654 N.W.2d 242, *abrogated on other grounds by Harbor*, 2011 WI 28, ¶¶ 40–52, 333 Wis. 2d 53 (holding that, despite elimination of parole by Truth in Sentencing, rehabilitation not considered a new factor); *State v. Ambrose*, 181 Wis. 2d 234, 510 N.W.2d 758 (Ct. App. 1993). "Substantial assistance" to law enforcement, however, may qualify as a new factor. *State v. Doe*, 2005 WI App 68, ¶¶ 8–10, 280 Wis. 2d 731, 697 N.W.2d 101.

Wis. Stat. § 973.19 also provides for a separate and distinct form of sentence modification motion outside of the Wis. Stat. § 809.30 postconviction process. Wis. Stat. § 973.19(1)(a) permits a defendant who has not requested transcripts under Wis. Stat.

§ 809.30(2) to move the court to modify sentence within 90 days after sentencing. This procedure, however, comes with serious disadvantages and is to be avoided in most cases, for the following reasons.

Most importantly, a defendant waives *all* other potential appellate issues by filing under this section. Wis. Stat. § 973.19(5). Further, if the defendant wants to appeal from denial of a Wis. Stat. § 973.19 motion, the SPD is prohibited from appointing an attorney unless the Wis. Stat. § 973.19 motion is filed within 20 days after sentencing or a notice of intent to pursue postconviction relief is timely filed. *See* Wis. Stat. § 977.05(6)(e). Finally, in *Noll*, 2002 WI App 273, ¶¶ 9–16, 258 Wis. 2d 573, the court of appeals held that relief under this section is limited to claims that the sentence imposed is an erroneous exercise of discretion because of excessiveness, undue harshness, or unconscionability, rather than those claims involving a new factor.

A defendant nevertheless choosing to proceed under Wis. Stat. § 973.19(1)(a) should be aware that a motion under this section is, by its terms, apparently only available to those sentenced to prison or ordered to pay a fine, rather than those placed on probation. The court has 90 days to decide the motion, extendable for cause for an additional 90 days. Wis. Stat. § 973.19(2). The motion is deemed denied if not decided within the time for decision. Wis. Stat. § 973.19(3). An appeal from a denial of the motion is governed by the civil, rather than the criminal, appellate rules. Wis. Stat. § 973.19(4).

> ***Caution.*** In general, any relief that would be available under Wis. Stat. § 973.19 will be available under the Wis. Stat. § 809.30 procedure; thus, if there is any possibility that the defendant will wish to pursue any other issues, Wis. Stat. § 973.19 should be eschewed.

b. Resentencing [§ 9.14]

A defendant dissatisfied with his or her sentence may wish to request an entirely new sentencing hearing. A number of different grounds will support a claim for resentencing, among them:

1. The circuit court's failure to give reasons for the sentence imposed, *see State v. Gallion*, 2004 WI 42, ¶ 4, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971);

2. A sentence based on impermissible factors, *see Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *Brozovich v. State*, 69 Wis. 2d 653, 230 N.W.2d 639 (1975);

3. A sentence based on incorrect information, *see State v. Tiepelman*, 2006 WI 66, ¶¶ 2, 14, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that defendant must establish both that information presented to sentencing court was inaccurate and that court relied on that information; "actual reliance" means that the court focused attention on the misinformation such that it "formed part of the basis for the sentence"; reliance need not be "prejudicial");

4. Prosecutorial breach of plea agreement; plea withdrawal is also a possible remedy, but resentencing is the "preferred" one, *State v. Howard*, 2001 WI App 137, ¶¶ 32–37, 246 Wis. 2d 475, 630 N.W.2d 244.

While a defendant seeking resentencing is likely displeased with the sentence received, an attorney has an obligation to inform the client that, unless the maximum sentence has already been imposed, it is possible for things to get worse. A defendant appearing before the same judge who imposed the first sentence is protected by a "presumption of vindictiveness" against a higher sentence, but this presumption may be overcome if the judge can provide specific and objective reasons for imposing one. *State v. Naydihor*, 2004 WI 43, ¶ 33, 270 Wis. 2d 585, 678 N.W.2d 220. The presumption may be of less force when a different judge conducts the resentencing, *State v. Tarwid*, 147 Wis. 2d 95, 104, 433 N.W.2d 255 (Ct. App. 1988), and may not apply at all when the trial court, rather than an appellate court, grants resentencing, see *State v. Sturdivant*, 2009 WI App 5, ¶¶ 12–13, 316 Wis. 2d 197, 763 N.W.2d 185.

c. Illegal Sentence [§ 9.15]

If a sentence exceeds the legal maximum, the portion that is in excess is "void" and the sentence is to be commuted to the legal maximum "without further proceedings." Wis. Stat. § 973.13. The right to receive a sentence within the legal maximum cannot be waived. *State v. Hanson*, 2001 WI 70, ¶¶ 19–22, 244 Wis. 2d 405, 628 N.W.2d 759; *State v. Flowers*, 221 Wis. 2d 20, 22–23, 586

N.W.2d 175 (Ct. App. 1998). When an illegally long sentence was imposed along with other sentences, the court may restructure the other sentences to meet its sentencing goals. *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996).

d. Challenges to Court's Modification of Sentence [§ 9.16]

A court may not increase or decrease a sentence based on mere reflection alone. *State v. Wuensch*, 69 Wis. 2d 467, 230 N.W.2d 665 (1975); *State v. Prager*, 2005 WI App 95, ¶ 21, 281 Wis. 2d 811, 698 N.W.2d 837. *But cf. State v. Gruetzmacher*, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533 (holding that circuit court could, on its own motion, resentence defendant in conformity with court's original intention, following discovery of error in original sentence). When the sentencing court makes a good-faith mistake during sentencing and promptly recognizes the error, the court may resentence, even if that results in an increased sentence on one count and reduced punishment on another count, as long as the purpose of the resentencing is to achieve what the court originally intended. *Gruetzmacher*, 2004 WI 55, ¶ 29, 271 Wis. 2d 585 ("[T]he 'Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.'") (citing *United States v. DiFrancesco*, 449 U.S. 117, 135 (1980)); *see also State v. Robinson*, 2014 WI 35, 354 Wis. 2d 351, 847 N.W.2d 352 (holding that circuit court could lengthen sentence on day following sentencing after learning that sentence from a different county would impose no additional incarceration).

4. A Note on Ineffective Assistance of Counsel [§ 9.17]

Many postconviction motions allege ineffective assistance of counsel as a legal basis for a new trial, plea withdrawal, or other relief. To prevail on this theory, the defense ordinarily must show that (1) his or her trial attorney performed deficiently; and (2) the deficient performance caused prejudice to the defendant's case. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. McDowell*, 2004 WI 70, ¶ 30, 272 Wis. 2d 488, 681 N.W.2d 500; *State v. Franklin*, 2001 WI 104, ¶ 11, 245 Wis. 2d 582, 629 N.W.2d 289; *cf. United States v. Cronic*, 466 U.S. 648, 659–60 (1984) (describing limited exceptions to the *Strickland* test). The postconviction motion must allege specific facts; if the allegations are merely conclusory, the circuit court may deny the motion without a hearing. *See, e.g.*, *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996).

To prove deficient performance, the defendant must overcome a "strong presumption that counsel acted reasonably within professional norms." *State v. Westmoreland*, 2008 WI App 15, ¶ 16, 307 Wis. 2d 429, 744 N.W.2d 919 (quoting *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990)). An objective standard of reasonableness applies. *See State v. Champlain*, 2008 WI App 5, ¶ 20, 307 Wis. 2d 232, 744 N.W.2d 889. An attorney does not perform deficiently by failing to argue an unsettled point of law. *See State v. Maloney*, 2005 WI 74, ¶ 26, 281 Wis. 2d 595, 698 N.W.2d 583. However, the failure to know or learn relevant law, or to conduct any investigation of the pertinent facts is deficient performance. *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Thiel*, 2003 WI 111, ¶ 51, 264 Wis. 2d 571, 665 N.W.2d 305.

To prove that the trial attorney's deficient performance was prejudicial, the defendant must show that if the attorney had provided proper representation, a "reasonable probability" exists that the result would have been different. *See, e.g.*, *Strickland*, 466 U.S. at 694; *Mayo*, 2007 WI 78, ¶ 64, 301 Wis. 2d 642.

A motion alleging ineffective assistance of counsel must state sufficient facts to show how the case could have proceeded differently if the attorney had provided reasonable representation. *See State v. Love*, 2005 WI 116, ¶¶ 27–28, 284 Wis. 2d 111, 700 N.W.2d 62. If the motion is sufficiently specific to require an evidentiary hearing, the postconviction attorney must subpoena (or otherwise arrange for the appearance of) the trial attorney. *State v. Machner*, 92 Wis. 2d 797, 803–04, 285 N.W.2d 905 (Ct. App. 1979); *see also Allen*, 2004 WI 106, ¶ 8 & n.3, 274 Wis. 2d 568. Thus, the circuit court has the opportunity to consider the trial attorney's response to the alleged conduct.

> ***Practice Tip.*** It is not unusual for attorneys who regularly practice criminal defense to be questioned by postconviction attorneys about their trial-level representation of a client. Many testify at *Machner* hearings about their actions or inactions in defending their clients. Although attorneys generally do not enjoy the experience, they should realize that it is not a personal attack by the postconviction attorney. Instead, it is a required procedure for a postconviction attorney to raise issues (or specific theories in support of issues) that the trial attorney did not raise. *See, e.g.*, *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (holding that lack of objection at trial results in review within issue of ineffective assistance); *State v.*

Huebner, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Wery*, 2007 WI App 169, ¶ 7, 304 Wis. 2d 355, 737 N.W.2d 66.

An attorney testifying at a *Machner* hearing has ethical duties to his or her former client, including the general duty of confidentiality. *See* SCR 20:1.6. In an exception to the broad ethics rule on confidentiality, an attorney may disclose information related to client representation to the extent that the attorney reasonably believes that disclosure is necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." SCR 20:1.6(c)(4). Another exception allows disclosure when it is required by law or court order. SCR 20:1.6(c)(5). Disclosure under this exception is also limited to the information that the attorney reasonably believes necessary. *See also* SCR 20:1.9(c) (duty of confidentiality to former client). *See generally Office of Lawyer Regulation v. Thompson (In re Disciplinary Proc. Against Thompson)*, 2014 WI 25, 353 Wis. 2d 556, 847 N.W.2d 793.

Before testifying at a *Machner* hearing, the trial attorney should ascertain whether the former client has waived any claim of confidentiality. Without an express waiver of confidentiality, the trial attorney should never disclose client-related information to the prosecutor. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456, at 2 (2010). Similarly, the trial attorney should assert the ethics rule on confidentiality, the attorney-client privilege, *see* Wis. Stat. § 905.03, and other nonfrivolous grounds for declining to testify, until called to testify by the defense at a *Machner* hearing. Because the defendant has the burden to produce evidence at a *Machner* hearing, the defendant will ordinarily waive confidentiality regarding the subject matter of the hearing.

Good recordkeeping is critical in enabling the trial attorney to testify accurately regarding details of representation that occurred months, or even years, before the *Machner* hearing.

B. Procedural Motions [§ 9.18]

1. In General [§ 9.19]

Sections 9.20–.22, *infra*, discuss the motions typically brought before or during the litigation of the substantive motions discussed above.

2. Motion for Release Pending Appeal (Form 9.51A) [§ 9.20]

A motion for release pending appeal is directed to the circuit court. Wis. Stat. § 809.31(1). The trial attorney is responsible for seeking release pending appeal.

The circuit court has the discretion to grant release to a person appealing a misdemeanor or felony. Wis. Stat. § 969.01(2). Under Wis. Stat. § 809.31(3), the court may grant release if the court finds the following:

1. There is no substantial risk that the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings.

2. The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice.

3. The defendant will promptly prosecute postconviction proceedings.

4. The postconviction proceedings are not taken for purposes of delay.

In making the determination on the motion, the court must consider the nature of the crime, the length of the sentence, and other factors relevant to pretrial release. Wis. Stat. § 809.31(4).

If the circuit court denies the motion, the defendant may seek review of the denial by filing a motion in the court of appeals within 21 days after the court's order. Wis. Stat. § 809.31(5). The defendant must request a transcript of the proceedings within seven days after the entry of the circuit court order. *Id.* The defendant also must attach to the motion the specified circuit court records regarding the release issue. *Id.* The appellate court will reverse the circuit court's decision only if the circuit court erroneously exercised its discretion. *See State v. Whitty*, 86 Wis. 2d 380, 272 N.W.2d 842 (1978); *State v. Salmon*, 163 Wis. 2d 369, 471 N.W.2d 286 (Ct. App. 1991).

3. Motion for Determination of Competency [§ 9.21]

A "defendant is incompetent to pursue postconviction relief … when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *State v. Debra A.E.*, 188 Wis. 2d 111, 126, 523 N.W.2d 727 (1994). If the defense attorney doubts the defendant's competency, the attorney should file a motion in the circuit court or appellate court (depending on the stage of the proceedings) requesting a competency determination. *Debra A.E.*, 188 Wis. 2d at 131; *see also* Wis. Stat. §§ 971.13, 971.14 (competency standard; competency proceedings); *supra* Form 5.35A. While a competency determination is pending, the defense may nonetheless proceed with some issues. *Debra A.E.*, 188 Wis. 2d at 133–34. A motion for continuance or enlargement of time may be appropriate. *Id.* at 134; *see* Wis. Stat. § 809.82(2).

If the court finds the defendant to be incompetent, possible consequences include appointment of a temporary guardian and the ability to raise certain issues after regaining competency. *Debra A.E.*, 188 Wis. 2d at 135–36. Ordinarily, a finding of postconviction incompetency will not include an order for involuntary medication or treatment to restore competency. *Id.* at 130.

An order that the defendant is not competent to proceed is itself a final order appealable as of right. *State v. Scott*, 2018 WI 74, ¶ 11, 382 Wis. 2d 476, 914 N.W.2d 141. In the unlikely event that involuntary medication is ordered, that order is subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the state. *Id.* ¶¶ 30, 44–45. Wis. Stat. § 809.109, created in 2024, "provides a uniform, organized, and expedited handling of appeals from orders under [Wis. Stat. §] 971.14." Wis. Stat. § 809.109 Judicial Council Note.

4. Motion for Postconviction Discovery [§ 9.22]

Under limited circumstances, the defense has a due process right to obtain postconviction discovery. *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). The defense must show that the evidence sought is "consequential to the case," which means that the evidence would create a reasonable probability of a different result in the case. *See id.* This discovery right derives from the due process right to a meaningful opportunity to present a complete defense. *See id.* at 320. The *O'Brien* standard of consequential evidence also applies to the postconviction court's decision to release otherwise confidential records to the defense following in camera review. *See State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 661 N.W.2d 105.

Although the discovery request in *O'Brien* was filed as a postconviction motion, the defense could presumably combine this request with other pleadings seeking postconviction relief. Motions for postconviction discovery must also include all bases for appeal because postconviction discovery is not independent from other postconviction motions. *See State v. Kletzien*, 2011 WI App 22, ¶¶ 10–12, 331 Wis. 2d 640, 794 N.W.2d 920 (holding that defendants cannot bring a postconviction discovery motion separate from other postconviction motions and instead must consolidate all postconviction claims into one motion or appeal). In addition to the general discovery right recognized in *O'Brien*, a specific statutory right to request postconviction DNA testing applies under certain circumstances. *See infra* § 9.26.

C. Post-postconviction Motions [§ 9.23]

1. In General [§ 9.24]

Sections 9.25–.30, *infra*, discuss the forms of relief typically pursued sometime after the Wis. Stat. § 809.30 postconviction and any appeal processes (or after the deadlines have run in the absence of a motion or appeal).

2. Motion for Postconviction Relief Under Wis. Stat. § 974.06 [§ 9.25]

A motion for postconviction relief under Wis. Stat. § 974.06 is essentially a postconviction substitute for habeas corpus (discussed in section 9.37, *infra*). *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972). A petition for a writ of habeas corpus may not be entertained if it appears that the applicant has failed to apply for relief, by motion, from the sentencing court, or that the court has denied such a motion. Wis. Stat. § 974.06(8). An exception exists for cases in which it appears that the remedy available by motion is inadequate or ineffective. *Id.*

A Wis. Stat. § 974.06 motion may ask the circuit court to vacate, set aside, or correct the sentence on the grounds that (1) the sentence was imposed in violation of the U.S. Constitution or Wisconsin law; (2) the court lacked jurisdiction to impose the sentence; or (3) the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. Wis. Stat. § 974.06(1). A Wis. Stat. § 974.06 motion is limited to matters of jurisdictional or constitutional dimension. *See, e.g.*, *Peterson*, 54 Wis. 2d at 381. Such a motion may not raise issues relating to the jury instructions, error in the admission of evidence, or other procedural matters. *Id.*; *see also State v. Nicholson*, 148 Wis. 2d 353, 435 N.W.2d 298 (Ct. App. 1988).

The defendant may not bring a Wis. Stat. § 974.06 motion until the time for appeal or filing a postconviction motion under Wis. Stat. § 809.30 has expired or until the defendant has exhausted those remedies. *See* Wis. Stat. § 974.06(1); *see also* Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30, *supra* § 9.7. Once the above condition is met, the motion may be brought at any time. Wis. Stat. § 974.06(2). Generally, a defendant will bring a Wis. Stat. § 974.06 motion when the issues are not raised or discovered until after the appeal time has expired under Wis. Stat. § 809.30, or the appeal has been heard and decided on other grounds.

The court will not consider an issue raised in a Wis. Stat. § 974.06 motion if the issue has "been finally adjudicated, waived or not raised in a prior postconviction motion," unless a good reason exists for the failure to raise the issue in the previous proceeding. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994); *see also State v. Thames*, 2005 WI App 101, ¶ 11, 281 Wis. 2d 772, 700 N.W.2d 285. This rule applies to issues that could have been raised on direct appeal, in a motion under Wis. Stat. § 974.02, or in a motion under Wis. Stat. § 974.06. *Escalona-Naranjo*, 185 Wis. 2d at 185–86.

To bring this motion, the movant must be "a prisoner in custody under sentence of a court." Wis. Stat. § 974.06(1).

Proceedings under Wis. Stat. § 974.06 are considered civil in nature, and the burden of proof is on the prisoner. Wis. Stat. § 974.06(6).

3. Motion for Postconviction Deoxyribonucleic Acid (DNA) Testing of Certain Evidence [§ 9.26]

At any time after conviction, a person may file a motion in the circuit court requesting forensic DNA testing of evidence that (1) is relevant to the investigation or prosecution that resulted in the conviction; (2) is in the actual or constructive possession of a government agency; and (3) has not previously been subjected to forensic DNA testing. Wis. Stat. § 974.07(2). *But see State v. Bembenek*, 2006 WI App 198, ¶¶ 12, 19, 296 Wis. 2d 422, 724 N.W.2d 685 (holding that when defendant, as part of plea agreement, waived the right to collaterally attack conviction, court properly dismissed postconviction motion for DNA testing as remedy for defendant's breach of agreement). Previously tested evidence may be subjected to another DNA test if a different scientific technique, not available or not utilized at the time of the previous testing, is used and if the test provides a reasonable likelihood of more accurate and probative results. Wis. Stat. § 974.07(2)(c).

The defense attorney must serve a copy of the motion requesting DNA testing on the district attorney's office. Wis. Stat. § 974.07(3). Failure to serve a copy of the motion on the district attorney does not deprive the circuit court of its jurisdiction and does not provide grounds for denying the motion. *Id.*

Under Wis. Stat. § 974.07(7)(a), a circuit court *must* grant a motion for DNA testing of certain evidence if all of the following apply:

1. The motion claims that the defendant is innocent.

2. A reasonable probability exists that exculpatory DNA evidence would have resulted in a decision not to prosecute or a not guilty verdict.

3. The evidence to be tested meets the conditions stated in Wis. Stat. § 974.07(2)(a)–(c).

4. The chain of custody or the testing itself establishes, or can establish, the integrity of the evidence.

Under Wis. Stat. § 974.07(7)(b), a circuit court *may, in its discretion*, grant a motion for DNA testing of certain evidence if all of the following apply:

1. It is reasonably probable that the outcome of the proceedings would have been more favorable to the movant if the results of DNA testing had been available.

2. The evidence to be tested meets the conditions stated in Wis. Stat. § 974.07(2)(a)–(c).

3. The chain of custody or the testing itself establishes, or can establish, the integrity of the evidence.

The circuit court may impose reasonable conditions on any DNA testing that it orders. Wis. Stat. § 974.07(8). The court may order the state crime laboratory or another facility to perform the testing. *Id.*

If a hearing on the motion is scheduled, the court clerk must notify the victim of the offense of the hearing date. The clerk must mail the victim a copy of the motion within 7 days after date of filing, and must send the notice of hearing at least 10 days before the hearing. Wis. Stat. § 974.07(4)(a).

The district attorney is responsible for preserving biological material collected in connection with a case. Wis. Stat. § 974.07(5). Upon demand, the district attorney must disclose whether the biological material was subjected to DNA testing. Wis. Stat. § 974.07(6)(a). In addition, the district attorney must “make available to the movant or his or her attorney” the following:

1. Findings based on testing of biological materials, Wis. Stat. § 974.07(6)(a)1.; and

2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is a biological material, Wis. Stat. § 974.07(6)(a)2.

The provision that physical evidence be “made available” to the defense does not authorize the movant to send away the evidence for testing. Any testing of evidence for DNA must meet the Wis. Stat. § 974.07(7) standards, listed above. *See State v. Denny*, 2017 WI 17, ¶¶ 64–65, 373 Wis. 2d 390, 891 N.W.2d 144.

Upon demand, the movant or his or her attorney must make available to the district attorney the movant’s biological specimen, in addition to the findings from the testing of the biological materials. Wis. Stat. § 974.07(6)(b).

The court may order a movant who is not indigent to pay for the cost of court-ordered DNA testing. Wis. Stat. § 974.07(12). A movant who is not represented by an attorney and who claims to be indigent will be referred by the circuit court to the SPD for a determination of financial eligibility and, if eligible, for representation. Wis. Stat. § 974.07(11). Although the statute does not specify the financial responsibility for DNA testing requested by an indigent defendant, presumably the county or the state is responsible.

Under Wis. Stat. § 974.07(9), if the circuit court denies a movant’s request for DNA testing, or if the results of a DNA test do not support the movant’s claim, the court must order the disposition of the evidence in question. Under certain conditions, the court must order preservation of the evidence. *Id.* If the defendant wants to appeal the denial of the motion, the defense attorney should seek an order preserving the evidence throughout the appellate process.

If the results of the DNA testing support the movant’s claim, the court will schedule a hearing to determine the appropriate relief for the movant. Wis. Stat. § 974.07(10)(a). If, after the hearing, the court determines that relief for the movant is appropriate, the court must provide any of the following forms of relief, as the interests of justice require:

1. An order setting aside or vacating the judgment;

2. An order granting the movant a new trial or fact-finding hearing;

3. An order granting the movant a new sentencing hearing or commitment hearing; or

4. An order discharging the movant from custody.

Wis. Stat. § 974.07(10)(a).

> ***Note.*** The circuit court may order a new trial, based on the results of the DNA test presented at the hearing, without regard to Wis. Stat. § 805.15(3)(a) and (b), which provide for a new trial on the grounds of newly discovered evidence only when the evidence came to the moving party's attention after trial and the moving party's failure to discover the evidence earlier did not arise from his or her lack of diligence in seeking to discover it. *See* Wis. Stat. § 974.07(10)(b).

The parties may appeal from an order relating to DNA testing as from a final judgment. Wis. Stat. § 974.07(13); *see* Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30, *supra* §§ 9.2–.7.

4. Petitions for Modification of Conditions of Extended Supervision Under Wis. Stat. § 302.113(7m) (Forms 9.52A–.52C) [§ 9.27]

Under Wis. Stat. § 302.113(7m), either a defendant serving a bifurcated sentence or the DOC may petition a sentencing court to modify any judicially imposed conditions of extended supervision.

An inmate may not petition to modify the conditions of extended supervision earlier than one year, or more than once, before the inmate's scheduled date of release to extended supervision. Wis. Stat. § 302.113(7m)(e)1. Petitioning for modification of the conditions of extended supervision is also prohibited for one year after the defendant's release to extended supervision. Wis. Stat. § 302.113(7m)(e)2. Once a petition has been filed, the defendant may not file another petition until one year after the date of filing the previous petition. *Id.* The statutory time restrictions, however, do not apply to constitutional challenges to the validity of conditions of extended supervision. *State v. Fisher*, 2005 WI App 175, ¶ 14, 285 Wis. 2d 433, 702 N.W.2d 56.

The defense must serve a copy of the petition on the DOC. Wis. Stat. § 302.113(7m)(b). Upon receiving a petition to modify the conditions of extended supervision, the sentencing court must serve the district attorney. *Id.* The court may also require the clerk of the court to serve a copy of the petition on the victim of any crime committed by the defendant. *Id.*

If the court conducts a hearing on a petition for modification, it may grant the petition, in whole or in part, if it determines that modification would meet the needs of the DOC and the public, and would be consistent with the objectives of the inmate's sentence. Wis. Stat. § 302.113(7m)(c).

The defendant may appeal an adverse ruling on a petition. Wis. Stat. § 302.113(7m)(d). The reviewing court will reverse the sentencing court's order only if it determines that the sentencing court erroneously exercised its discretion in granting or denying the petition. *Id.*

5. Court Hearing Regarding Positive Adjustment Time [§ 9.28]

Created by 2009 Wis. Act 28, positive adjustment time (PAT) was a mechanism to shorten the prison terms of persons convicted of certain offenses. *See* Wis. Stat. §§ 302.113(1), (2) (2007–08), 304.06(1)(bg) (2007–08), *as affected by* 2009 Wis. Act 28. PAT was repealed by 2011 Wisconsin Act 38, but the act contained a grandfather clause for inmates who earned PAT between October 1, 2009 and August 3, 2011. *See* Wis. Stat. § 973.198(1); 2011 Wis. Act 38, § 100; *see also supra* chs. 1, 8. Anyone advising a client who committed crimes, was sentenced, or was serving sentences during the short life of 2009 Wis. Act 28 early-release laws should review the Wisconsin Supreme Court's 118-page decision in *State ex rel. Singh v. Kemper*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86, to determine whether the client may have an ex post facto claim. The decision comprises several disputes among the justices (four opinions were filed). The lack of a majority vote on any of the methodologies means no new ex post facto standard was created. The court of appeals below had concluded, in *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶ 10–19, 353 Wis. 2d 520, 846 N.W.2d 820, that because of ex post facto concerns those sentenced under the Act 28 regime are entitled to earn PAT even after the enactment of Act 38.

6. Petitions for Release to Extended Supervision for Felony Offenders Serving Life Sentences Under Wis. Stat. § 302.114 [§ 9.29]

When a court has sentenced a person to life imprisonment for a crime committed on or after December 31, 1999, and has made a determination as to the date the inmate would be eligible for extended supervision pursuant to Wis. Stat. § 973.014(1g)(a)1. or 2., the inmate may file a petition in the sentencing court seeking release to extended supervision. Wis. Stat. § 302.114(1), (5)(a).

An inmate may not file a petition for release to extended supervision earlier than 90 days before his or her extended supervision eligibility date. Wis. Stat. § 302.114(5)(a). The sentencing court must summarily deny a petition filed before this time. *Id.*

The date on which an inmate serving a life sentence becomes eligible to petition the sentencing court for release to extended supervision is either 20 years after he or she began serving the sentence, or a later date predetermined by the court. Wis. Stat. § 302.114(2); *see* Wis. Stat. § 973.014(1g)(a)1., 2.

The inmate must serve a copy of the petition on the district attorney. Wis. Stat. § 302.114(5)(am). Within 45 days after receiving the petition, the district attorney must file a written response to the petition. *Id.*

Before granting or denying an inmate's petition, the sentencing court must provide the victim of the crime with the opportunity to make an oral or written statement concerning the inmate's potential release to extended supervision. Wis. Stat. § 302.114(5)(c).

The inmate must prove, by clear and convincing evidence, that he or she is not a danger to the public before the sentencing court will grant the petition. Wis. Stat. § 302.114(5)(cm).

If the sentencing court denies the inmate's petition, the inmate may file a later petition on or after a date specified by the court. Wis. Stat. § 302.114(5)(e). Filing a petition before that time will result in its automatic denial without a hearing. *Id.*

An inmate whose petition is denied may appeal the sentencing court's decision. Wis. Stat. § 302.114(5)(f). The reviewing court will determine whether the sentencing court erroneously exercised its discretion in denying the inmate's petition. *Id.*

7. Petition for Release for Inmate Due to Age or Extraordinary Health Condition [§ 9.30]

An inmate convicted of certain offenses and serving a bifurcated sentence may petition the program review committee (PRC) at the institution where the inmate is confined for release if the inmate meets one of the following criteria:

1. The inmate is 65 years of age or older and has served at least 5 years of the term of confinement in prison portion of the bifurcated sentence.

2. The inmate is 60 years of age or older and has served at least 10 years of the term of confinement in prison portion of the bifurcated sentence.

3. The inmate has an extraordinary health condition.

Wis. Stat. § 302.113(9g)(b)–(c).

If the PRC denies an inmate's petition for sentence modification that is based on age or an extraordinary health condition, the inmate cannot file another petition for one year after the date of the PRC's decision. Wis. Stat. § 302.113(9g)(i). If the PRC approves an inmate's petition for sentence modification, it will refer the petition to the circuit court for a hearing. Wis. Stat. § 302.113(9g)(cm). If the circuit court denies the petition following the hearing, the inmate may not file another petition for one year after the date of the court's decision. Wis. Stat. § 302.113(9g)(i). An inmate can appeal a court's denial of his or her petition and the state can appeal a court's decision to grant an inmate's petition. Wis. Stat. § 302.113(9g)(h). The court of appeals will overturn a decision only for a circuit court's erroneous exercise of discretion. *Id.*

An inmate eligible to seek sentence modification based on age or an extraordinary health condition has the right to be represented by counsel in the proceedings, and the inmate (or the DOC on the inmate's behalf) may apply to the SPD for appointment of counsel. Wis. Stat. § 302.113(9g)(j). The department has the authority to promulgate administrative rules establishing guidelines and criteria for the exercise of discretion. Wis. Stat. § 302.113(10).

D. Writs (Extraordinary Remedies) as Methods of Review [§ 9.31]

1. Introduction [§ 9.32]

Writs of mandamus or prohibition (Wis. Stat. ch. 783), quo warranto (Wis. Stat. ch. 784), habeas corpus (Wis. Stat. ch. 782), certiorari, and *coram nobis* are considered extraordinary remedies. As a rule, a defendant may use one of these writ procedures only when he or she has no other adequate remedy available at law. Consequently, a writ or extraordinary remedy is inappropriate when the issue in question can be resolved in ordinary proceedings, such as direct appeal, interlocutory appeal, or Wis. Stat. § 974.06 postconviction proceedings.

2. Procedure [§ 9.33]

a. Non-Writ Procedure [§ 9.34]

Wis. Stat. § 781.01 eliminates the need to follow the traditional writ procedure when applying for the relief customarily sought by writ of mandamus, prohibition, quo warranto, certiorari, or habeas corpus. Wis. Stat. § 781.01 makes these remedies available by a final judgment or a provisional remedy in an ordinary action in the circuit court. The use of this *non-writ procedure* does not alter the nature of any extraordinary remedy or the scope of the proceedings, including without limitation the relief available, discovery, the availability of a jury trial, and the burden of proof. Wis. Stat. § 781.01.

The parties are plaintiff and defendant. *See* Wis. Stat. § 801.03(1), (3). The plaintiff files and serves a complaint demanding the remedy of mandamus, prohibition, quo warranto, certiorari, or habeas corpus, together with a summons or order signed by a judge and requiring an answer within 45 days, if the defendant is the state or its agent, or 20 days for other defendants. *See* Wis. Stat. §§ 801.02, 801.09, 802.06(1).

The plaintiff may request temporary relief by motion. Wis. Stat. § 781.02. Procedure on the motion is governed by Wis. Stat. § 801.15(4). If the plaintiff can establish that an emergency exists, the court may rule on the motion ex parte. *Id.*

The defendant must arrange for the transmittal of any record that must be reviewed, or give notice to the person in possession of the record. Wis. Stat. § 781.03(1).

For a discussion of writ procedure in the circuit court, see sections 9.36–.42, *infra.*

b. Writ Procedure in the Court of Appeals and Supreme Court [§ 9.35]

In the appeals courts, parties filing writs follow the procedure set forth in Wis. Stat. § 809.51, which deals with supervisory writs and original jurisdiction to issue prerogative writs.

Wis. Stat. § 809.51(1) requires the filing of a petition and a supporting memorandum. If the attorney is seeking temporary relief pending disposition of the petition, he or she should include the request for the temporary relief in the petition. Wis. Stat. § 809.52. A request for temporary relief under Wis. Stat. § 809.52 should not be boilerplate. The court will routinely deny any request that is not supported by facts or arguments supporting the need for immediate relief.

The petition and supporting memorandum should be electronically filed in the court of appeals, but the petitioner must serve the parties, proposed respondents, and, if applicable, the originating court or tribunal, by traditional methods. Wis. Stat. § 809.51(1). The court of appeals generally does not conduct hearings in proceedings under Wis. Stat. § 809.51. If the court deems a hearing necessary, it will schedule the date.

The court of appeals does not have a writ judge. The judge who will initially rule on the petition is referred to as the motions judge. A conference with the motions judge will be scheduled only if emergency relief (i.e., within 24 hours) is requested.

The motions judge decides whether to deny the petition ex parte or order a response. Wis. Stat. § 809.51(2). If the court orders a response, the respondent has 14 days from service of the order in which to respond. *Id.* A respondent may file a letter stating that he or she does not intend to file a response, but that the petition is not thereby admitted. *Id.*

The judge will usually decide whether to grant or deny the petition on the basis of the petition, the response, and any supporting memoranda. Oral argument is rarely ordered.

The court of appeals drafts all of its own orders; the attorney need not prepare a writ in advance.

3. Writ Practice in General: Waiver or Deferral of Filing Fees [§ 9.36]

Many inmates seeking relief by writ lack the funds to pay the civil filing fees under Wis. Stat. §§ 814.61(1) ($75 filing fee) and 814.85(1)(a) ($68 court support-services fee). The process for seeking deferral or waiver of this fee depends on whether the inmate is a prisoner, as defined in Wis. Stat. § 801.02(7)(a)2.

A *prisoner* is an inmate in a state or local correctional institution, such as a prison or jail, who has been charged with or convicted of a crime. Wis. Stat. § 801.02(7)(a). However, people in certain types of confinement or seeking certain forms of relief are specifically excluded from this definition, such as persons challenging termination of parental rights or seeking relief from a judgment of conviction or sentence. *See* Wis. Stat. § 801.02(7)(a)2. An inmate housed out of state is not a prisoner under Wis. Stat. § 801.02(7)(a)2.

A prisoner who wants to file a petition without prepayment of costs must submit the following: (1) an affidavit of indigency, Wis. Stat. § 814.29(1)(b), (1m)(b)1.; (2) a certified trust-fund account statement (or statements, if the prisoner has been incarcerated in multiple institutions) for the previous six months, Wis. Stat. § 814.29(1m)(b)2.; (3) authorization for the institution to pay money from the prisoner's account toward the court fees when the account balance exceeds $10, Wis. Stat. § 814.29(1m)(c)2.; and (4) certification from the Department of Justice (DOJ) that the prisoner has not had three or more previous cases dismissed as frivolous or otherwise improper under Wis. Stat. § 802.05(3)(b), *see* Wis. Stat. § 801.02(7)(d); *infra* Form 9.44C.

A petitioner not subject to the requirements in the previous subsection may seek a waiver of the filing fee by submitting an affidavit of indigency pursuant to Wis. Stat. § 814.29(1)(b). The affidavit must briefly describe the nature of the petitioner's "cause, defense or appeal." *Id.* This requirement is satisfied by attaching the underlying petition to the standard Petition for Waiver of Filing and Service Fees—Affidavit of Indigency and Order. *See infra* Form 9.44F.

4. Writ of Habeas Corpus (Forms 9.45A–.45C) [§ 9.37]

The writ of habeas corpus, when prosecuted by a defense attorney on a defendant's behalf in a criminal case, is the modern equivalent of the *habeas corpus ad subjiciendum*. *See Habeas corpus*, *Black's Law Dictionary* (11th ed. 2019). Much of what traditionally could be litigated by habeas corpus now must be raised by means of interlocutory appeal, direct appeal, or Wis. Stat. § 974.06 postconviction motion. Like all other extraordinary remedies, habeas corpus is only available if no other adequate remedy at law exists. *See, e.g.*, *State ex rel. Dowe v. Circuit Ct. for Waukesha Cnty.*, 184 Wis. 2d 724, 729, 516 N.W.2d 714 (1994) ("[H]abeas corpus will not be granted where other adequate remedies at law exist.").

In addition to demonstrating the absence of an adequate remedy at law, the habeas petitioner must meet two other prerequisites. The petitioner must be restrained of his or her liberty, and the restraint must have been imposed without jurisdiction or contrary to constitutional protections. Absent a showing that all three criteria are met, the writ of habeas corpus will not issue. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 23, 262 Wis. 2d 720, 665 N.W.2d 115.

Because habeas corpus is an equitable doctrine, the remedy is not limited to release of the person confined. Habeas corpus may be used to "tailor a fair and just remedy for the given factual circumstances," provided that the remedy "does not itself violate the constitution." *State ex rel. Fuentes v. Wisconsin Ct. of Appeals*, 225 Wis. 2d 446, 450–51, 593 N.W.2d 48 (1999); *see also State ex* *rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288–89, 249 N.W.2d 573 (1977). Habeas corpus may be an appropriate vehicle for the following:

1. Challenging a criminal complaint or a ruling on the sufficiency of a criminal complaint, *see State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 425 N.W.2d 21 (Ct. App. 1988); *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 369 N.W.2d 743 (Ct. App. 1985);

2. Securing court review of the detention of a person held in custody but not charged or brought before a court within 48 hours, *see County of Riverside v. McLaughlin*, 500 U.S. 44 (1991);

3. Challenging extradition, Wis. Stat. § 976.03; *see State v. Ritter*, 74 Wis. 2d 227, 246 N.W.2d 552 (1976); *State ex rel. Kohl v. Kubiak*, 255 Wis. 186, 38 N.W.2d 499 (1949);

4. Challenging the continued restraint of a person institutionalized as not competent, *see State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973);

5. Raising a claim of ineffective assistance of counsel at a probation revocation proceeding, *see State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984) (dicta); *cf. State ex rel. Reddin v. Galster*, 215 Wis. 2d 178, 182–83, 572 N.W.2d 505 (Ct. App. 1997) (holding that habeas relief was not available for review of administrative decision to revoke probation, because certiorari review was available);

6. Challenging a request for a temporary transfer of custody under the Uniform Detainer Act, Wis. Stat. § 976.05; *see State ex rel. Garner v. Gray*, 55 Wis. 2d 574, 201 N.W.2d 163 (1972); and

7. Raising a claim of ineffective assistance of appellate counsel, *see, e.g.*, *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 16, 290 Wis. 2d 352, 714 N.W.2d 900; *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992) (discussing petition for writ filed in court that heard direct appeal); *cf. State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678–81, 556 N.W.2d 136 (Ct. App. 1996) (discussing petition filed in circuit court to address alleged ineffectiveness of postconviction counsel for alleged failure to raise postconviction issue in circuit court, as distinguished from appellate counsel). *But see Coleman*, 2006 WI 49, ¶¶ 19–29, 290 Wis. 2d 352 (discussing test for prosecution defense of laches when substantial delay occurs before filing of habeas petition).

A petition for habeas corpus is not appropriate when used in the following circumstances:

1. As a substitute for an appeal, *State v. Pozo*, 2002 WI App 279, ¶ 8, 258 Wis. 2d 796, 654 N.W.2d 12;

   Note. In a postconviction setting, a petition for writ of habeas corpus will not be granted when (1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so with no valid reason to excuse such failure; or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict. *Id.* ¶ 9.

2. To challenge the sufficiency of the evidence at trial, *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 112, 194 N.W.2d 808 (1972);

   Note. Habeas corpus is also not available to challenge the erroneous admission of evidence at trial or improper instructions to the jury. *See State v. Langston*, 53 Wis. 2d 228, 191 N.W.2d 713 (1971).

3. To challenge the sufficiency of the evidence at a preliminary hearing, *Dowe*, 184 Wis. 2d at 727;

   Note. This challenge may be made by a motion to dismiss the information in the circuit court, with an interlocutory appeal. *Id.* at 731–33. (The court of appeals, however, has discretion to grant or deny “leave to appeal.” Wis. Stat. § 809.50.)

4. When the same issue has been, or is being, heard in another court of concurrent jurisdiction on habeas corpus, *State ex rel. Reynolds v. Kenosha Cnty. Ct.*, 11 Wis. 2d 560, 105 N.W.2d 876 (1960);

5. When adequate relief is available under Wis. Stat. § 974.06, *see* Wis. Stat. § 974.06(8); *see also supra* § 9.32 (motions for postconviction relief under Wis. Stat. § 974.06);

6. When an inmate is challenging the nature of his or her imprisonment but not the imprisonment itself or its duration, *see State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 499 N.W.2d 276 (Ct. App. 1993); or

7. To challenge the administrative decision to revoke probation, *Reddin*, 215 Wis. 2d at 183. *But cf. Ramey*, 121 Wis. 2d at 182 (suggesting that habeas corpus review may be available to challenge effectiveness of counsel in revocation proceeding).

A petition for a writ of habeas corpus may be made to the supreme court, the court of appeals, or the circuit court. Wis. Stat. § 782.03. The supreme court and court of appeals will generally attempt to refer the matter to a lower court if relief is available there.

Wis. Stat. ch. 782 provides the procedure for petitioning for a writ of habeas corpus in the circuit court. Wis. Stat. § 753.04 governs writs issued from the circuit courts generally. The petitioner's attorney should also check local court rules.

The petition is on the relation of (*ex rel.*) the petitioner-plaintiff. The party on whom the writ is to be served is the respondent-defendant. Wis. Stat. § 782.01(3). The reply to the petition is called a return. The writ must specify the time within which the defendant must make a return. Wis. Stat. § 782.07(2). The prisoner may move to strike the return, deny any facts set forth in the return, or allege any fact to show that the imprisonment is unlawful or that the prisoner is entitled to relief. Wis. Stat. § 782.19. These allegations and denials must be verified by oath. *Id.*

If no legal cause is shown for the imprisonment or restraint, the court must order that the prisoner be discharged. Wis. Stat. § 782.20.

Wis. Stat. §§ 809.51 and 809.52 dictate the writ procedure in the court of appeals and the supreme court. *See supra* § 9.35.

5. Writ of Certiorari (Forms 9.46A–.46C) [§ 9.38]

A writ of certiorari seeks review of a final order or judgment of a lower court or a quasi-judicial administrative body. *See State ex rel. Hippler v. City of Baraboo*, 47 Wis. 2d 603, 178 N.W.2d 1 (1970). Absent a statutory provision for judicial review, the decision of an administrative agency may be challenged by certiorari. *See Gentilli v. Board of Police & Fire Comm'rs*, 2004 WI 60, ¶ 19, 272 Wis. 2d 1, 680 N.W.2d 335; *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 499 N.W.2d 276 (Ct. App. 1993). Failure to exhaust administrative appeals may bar a certiorari petition. *See State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶¶ 5–9, 242 Wis. 2d 94, 624 N.W.2d 150.

The scope of review is limited. Certiorari is confined to a review of the record and facts that may be judicially noticed; it is not available when the error is not apparent in the record. *See, e.g.*, *Van Ermen v. DHSS*, 84 Wis. 2d 57, 267 N.W.2d 17 (1978); *Franklin v. Housing Auth. of Milwaukee*, 155 Wis. 2d 419, 425, 455 N.W.2d 668 (Ct. App. 1990). Certiorari is also confined to a review of a final order or judgment of the lower court or quasi-judicial administrative body. *See, e.g.*, *State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n*, 54 Wis. 2d 535, 538, 196 N.W.2d 742 (1972); *State ex rel. St. Mary's Hosp. v. Industrial Comm'n*, 250 Wis. 516, 27 N.W.2d 478 (1947).

Certiorari is available to test whether the decision maker (1) stayed within its jurisdiction; (2) acted contrary to law; (3) acted in an arbitrary, oppressive, or unreasonable manner, imposing its will and not its judgment; or (4) relied on evidence that did not reasonably support its decision. *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 12, 274 Wis. 2d 1, 681 N.W.2d 914; *Gentilli*, 2004 WI 60, ¶ 19, 272 Wis. 2d 1.

Certiorari is also used to test the sufficiency of the evidence to support the decision of the lower court or tribunal. *State v. Goulette*, 65 Wis. 2d 207, 222 N.W.2d 622 (1974). But certiorari is not a substitute for appeal. Certiorari is available only when statutory appeal is inadequate or nonexistent. *Gentilli*, 2004 WI 60, ¶ 19, 272 Wis. 2d 1.

The court in a certiorari proceeding has the authority to affirm or reverse an agency's decision, but not, as a general rule, to order the agency to take specific action. *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993). On review of a certiorari decision, the appellate court will consider whether there is substantial evidence to support the agency's decision. *See, e.g.*, *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (probation revocation). The reviewing court does not conduct a de novo review. *Van Ermen v. Department of Health & Soc. Servs.*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

In criminal cases, writs of certiorari are generally used to seek review of decisions to revoke supervision, parole decisions or deferrals, and prison disciplinary actions. *See State ex rel. Anderson-El v. Cooke*, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821; *Drow v. Schwarz*, 225 Wis. 2d 362, 367, 592 N.W.2d 623 (1999); *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980); *State ex rel. Purifoy v. Malone*, 2002 WI App 151, ¶ 13, 256 Wis. 2d 98, 648 N.W.2d 1. The certiorari court should consider a jurisdictional challenge to the underlying sentence because this type of challenge may be raised at any stage of court proceedings. *Bartus v. Department of Health & Soc. Servs.*, 176 Wis. 2d 1063, 1082–83, 501 N.W.2d 419 (1993).

In reviewing the merits of a revocation decision, the certiorari court defers to the hearing examiner's decision. *See, e.g.*, *Von Arx*, 185 Wis. 2d at 655. The petitioner has the burden of proving that the revocation decision was arbitrary and capricious. *See, e.g.*, *id.*

A prisoner, as defined in Wis. Stat. § 801.02(7)(a)2., must file a certiorari petition within 45 days after the decision in question. Wis. Stat. § 893.735(2); *State ex rel. Cramer v. Wisconsin Ct. of Appeals*, 2000 WI 86, ¶ 51, 236 Wis. 2d 473, 613 N.W.2d 591 (discussing time limit applicable to review of revocation of supervision). When a statute setting a time limit does not apply, the petition should be brought within six months of the final decision. *State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n*, 54 Wis. 2d 535, 196 N.W.2d 742 (1972). Otherwise, the certiorari review will be barred by the doctrine of laches. *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 575–76, 252 N.W.2d 28 (1977); *State ex rel. Reddin v. Galster*, 215 Wis. 2d 178, 184, 572 N.W.2d 505 (Ct. App. 1997).

The venue of a certiorari action to review a revocation of supervision or a refusal of parole is the "county in which the [defendant] was last convicted of an offense for which the [defendant] was on probation, extended supervision, or parole or for which the [defendant] is currently incarcerated." Wis. Stat. § 801.50(5).

Certiorari, unlike the other writs covered in this chapter, does not have its own chapter in the Wisconsin Statutes. The principal statutory references for the writ of certiorari as it applies to criminal defense are Wis. Stat. ch. 781 and Wis. Stat. §§ 753.04 and 801.50(5). Wis. Stat. § 753.04 governs writs issued by the circuit courts generally. The procedures for obtaining a writ of certiorari in the circuit court are analogous to those for the other extraordinary writs. The petitioner's attorney should also check local court rules.

The petition is on the relation of (*ex rel.*) the petitioner-plaintiff. The lower court or quasi-judicial administrative body whose decision is challenged is the respondent-defendant. The reply to the petition is called a return. The plaintiff may move to strike the return. If the plaintiff does not, the defenses alleged in the return are deemed controverted.

A writ of certiorari is confined to a review of the record. There is no evidentiary hearing and no right to a jury trial. *See Van Ermen*, 84 Wis. 2d at 64 (holding that inquiry is limited to whether there is substantial evidence in record to support administrative decision). Consequently, certiorari is not an adequate remedy when resolution of the issue would require information outside the record.

Writ procedure in the court of appeals and the supreme court is set forth in Wis. Stat. §§ 809.51 and 809.52. *See supra* § 9.35.

Appeal from the denial of a writ of certiorari follows the rules for the appeal of civil matters. *See* Wis. Stat. § 808.04. The appeal must be initiated within 45 days after entry of the order appealed from if written notice of the entry is given, or within 90 days if notice is not given. Wis. Stat. § 808.04(1).

6. Writ of Mandamus [§ 9.39]

Mandamus is an extraordinary writ that may be used to compel a public officer to perform a duty that he or she is legally bound to perform. "There are four prerequisites for issuance of a writ of mandamus: (1) a clear legal right; (2) a positive and plain duty;

(3) substantial damages; and (4) no other adequate remedy at law." *State ex rel. Griffin v. Litscher*, 2003 WI App 60, ¶ 5, 261 Wis. 2d 694, 659 N.W.2d 455.

Mandamus will not lie when appeal offers an adequate remedy. *State ex rel. Steffes v. Risjord*, 228 Wis. 535, 541, 280 N.W. 680 (1938); *State ex rel. Wis. Power & Light Co. v. Zimmermann*, 194 Wis. 193, 197, 215 N.W. 887 (1927). Thus, the defendant should file a motion in the circuit court and an interlocutory appeal of an adverse circuit court ruling when relief is available through these procedures. *See State ex rel. Dowe v. Circuit Ct. for Waukesha Cnty.*, 184 Wis. 2d 724, 730–34, 516 N.W.2d 714 (1994).

Wis. Stat. ch. 783 provides the procedure for a writ of mandamus in the circuit court. Wis. Stat. § 753.04 governs writs issued from the circuit courts generally. The petitioner's attorney should also check local court rules.

The petition is on the relation of (*ex rel.*) the petitioner-plaintiff. The party whose act, or failure to act, is complained of is the respondent-defendant. The reply to the petition is called a return. The writ must specify the time within which the defendant must make a return. *See* Wis. Stat. § 783.01. The plaintiff may move to strike the return. If the plaintiff does not, the defenses alleged in the return are deemed controverted. Wis. Stat. § 783.02.

A writ of mandamus may be the subject of evidentiary hearings, and the court may summon a jury to decide issues of fact. *See* Wis. Stat. § 783.03(1).

Writ procedure in the court of appeals and supreme court is set forth in Wis. Stat. §§ 809.51 and 809.52. *See supra* § 9.35.

7. Writ of Prohibition [§ 9.40]

A writ of prohibition seeks to prohibit an official from acting in an illegal manner or beyond his or her jurisdiction.

Prohibition is not available when appeal offers an adequate remedy. The party seeking prohibition has the burden of alleging sufficient facts to show that appeal is not an adequate remedy and that extraordinary harm will result if the writ is not granted. *State ex rel. Prentice v. Milwaukee Cnty. Ct.*, 70 Wis. 2d 230, 234 N.W.2d 283 (1975).

Wis. Stat. ch. 783 provides the procedure for obtaining a writ of prohibition in the circuit court. Wis. Stat. § 753.04 governs writs issued from the circuit courts generally. The petitioner's attorney should also check local court rules.

The petition is on the relation of (*ex rel.*) the petitioner-plaintiff. The party whose act, or failure to act, is complained of is the respondent-defendant. The reply to the petition is called a return. The writ must specify the time within which the defendant must make a return. Wis. Stat. §§ 783.01, 783.09. The plaintiff may move to strike the return. If the plaintiff does not, the defenses alleged in the return are deemed controverted. Wis. Stat. §§ 783.02, 783.10, 783.11.

A writ of prohibition may be the subject of evidentiary hearings, and the court may summon a jury to hear issues of fact. *See* Wis. Stat. §§ 783.10, 783.11; *State ex rel. Gaudynski v. Pruss*, 233 Wis. 600, 290 N.W. 289 (1940).

Writ procedure in the court of appeals and supreme court is set forth in Wis. Stat. §§ 809.51 and 809.52. *See supra* § 9.35.

8. Writ of Quo Warranto [§ 9.41]

The writ of quo warranto is used to test whether a person exercising power is legally entitled to do so. *Quo warranto*, *Black's Law Dictionary* (11th ed. 2019).

Writs of quo warranto are rarely used in criminal proceedings. They are probably most likely to be used to challenge a court commissioner's authority to perform the functions of a judge, or the propriety of a particular court commissioner's appointment. *See* Wis. Stat. §§ 757.68, 757.69, 807.04(1), 967.07.

Wis. Stat. ch. 784 governs the procedure for obtaining a writ of quo warranto in the circuit court. Wis. Stat. § 753.04 governs writs issued from the circuit courts generally. The petitioner's attorney should also check local court rules.

The petition is on the relation of (*ex rel.*) the petitioner-plaintiff. The person whose authority to act is challenged is the respondent-defendant. *See* Wis. Stat. §§ 784.03, 784.06. The defendant may move to dismiss the proceedings. *See* Wis. Stat. § 784.07.

A writ of quo warranto usually requires an evidentiary hearing, and the court may summon a jury to decide the evidentiary issues. *See* Wis. Stat. § 784.02.

Writ procedure in the court of appeals and supreme court is set forth in Wis. Stat. §§ 809.51 and 809.52. *See supra* § 9.35.

9. Writ of Coram Nobis [§ 9.42]

A writ of *coram nobis* is a tool that enables a circuit court to remove erroneous facts from the record or to correct its judgment. *Jessen v. State*, 95 Wis. 2d 207, 213–14, 290 N.W.2d 685 (1980).

A person seeking a writ of *coram nobis* must pass over two hurdles:

> First, he or she must establish that no other remedy is available…. Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment *and* the factual finding to which the alleged factual error is directed must not have been previously visited or "passed on" by the trial court.

State v. Heimermann, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996).

Coram nobis typically will only be available if the petitioner is not in custody; if he or she is in custody, other statutory provisions, such as Wis. Stat. § 974.06 (postconviction procedure after time for direct appeal has expired), would provide a remedy.

Writ procedure in the circuit court is set forth in Wis. Stat. § 753.04. Writ procedure in the court of appeals and the supreme court is set forth in Wis. Stat. §§ 809.51 and 809.52.

IV. Checklist of Postconviction Motions and Writs (CRM-0128) [§ 9.43]

Note. The following checklist is a selective list of postconviction motions, writs, and other forms that may be filed after conviction in a criminal case. The list is not exhaustive and cannot substitute for the defense attorney's independent judgment.

☐ Notice of intent to pursue postconviction relief. *Infra* Forms 9.47A–9.47B; Wis. Stat. § 809.30(2).

☐ Motion for new trial. *Infra* Form 9.48A; Wis. Stat. §§ 974.02, 805.15.

☐ Motion to withdraw guilty or no-contest plea. *Infra* Form 9.49A; Wis. Stat. § 971.08.

☐ Motion to modify sentence. *Infra* Form 9.50A; Wis. Stat. § 973.19.

☐ Motion to modify probation. Wis. Stat. § 973.09(3)(a).

☐ Motion for postconviction relief under Wis. Stat. § 974.06. Wis. Stat. § 974.06.

☐ Notice of appeal. Wis. Stat. §§ 809.10, 809.30, 974.02.

☐ Motion for release pending appeal. *Infra* Form 9.51A; Wis. Stat. §§ 808.075(4)(g), 809.31, 969.01, 969.08, 969.09.

☐ Motion for weekend pass.

☐ Motion for holiday furlough.

☐ Motion for determination of competency.

☐ Motion for postconviction discovery.

☐ Motion for postconviction DNA testing. Wis. Stat. § 974.07(2).

☐ Writ of habeas corpus. *Infra* Forms 9.45A–9.45C; Wis. Stat. chs. 781, 782.

☐ Writ of certiorari. *Infra* Forms 9.46A–9.46C; Wis. Stat. §§ 753.04, 781.01, 781.02, 801.50(5).

☐ Writ of *coram nobis*. Wis. Stat. § 753.04.

☐ Motion for stay of sentence. Wis. Stat. § 973.15(8).

☐ Motion to circuit court for release pending appeal. Wis. Stat. § 809.31(1).

☐ Motion to court of appeals to review denial of release pending appeal. Wis. Stat. § 809.31(5).

☐ Order granting release pending appeal. Wis. Stat. § 809.31.

☐ Petition to modify court-imposed conditions of extended supervision. *Infra* Forms 9.52A–9.52C; Wis. Stat. § 302.113(7m).

V. Writ Practice in General: Waiver or Deferral of Filing Fees [§ 9.44]

Commentary and Instructions for Forms 9.44A–9.44F

Form 9.44A	Prisoner's Petition for Waiver of Prepayment of Fees and Costs—Affidavit of Indigency (CRM-0129)
Form 9.44B	Order on Petition for Waiver of Fees and Costs (CRM-0130)
Form 9.44C	Wisconsin Department of Justice Certification Form as to Prior Dismissal(s) (DOJ Form DJ-LS-22) (CRM-0131)
Form 9.44D	Authorization to Withhold Money from Trust Account (CRM-0132)
Form 9.44E	Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs (CRM-0133)
Form 9.44F	Petition for Waiver of Fees and Costs—Affidavit of Indigency (CRM-0134)

Pursuant to the Wisconsin Prison Litigation Reform Act (PLRA), if a writ petition is being filed *in forma pauperis* by, or on behalf of, a "prisoner," as defined by Wis. Stat. § 801.02(7)(a)2., the petitioner must prepare a petition and order for waiver of prepayment of fees and costs (*infra* Forms 9.44A, 9.44B). Wis. Stat. § 814.29(1m); *see State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 592 N.W.2d 307 (Ct. App. 1999) (per curiam) (holding that inmate's petition for writ of habeas corpus, claiming ineffective assistance of counsel relating to probation revocation, was subject to provisions of the PLRA).

When a prisoner files a petition for a writ, the following documents must be attached: (1) the Petition/Affidavit and Order (*infra* Forms 9.44A, 9.44B), Wis. Stat. § 814.29(1m); (2) the original of the DOJ Certification as to Prior Dismissal(s), containing the DOJ raised seal (*infra* Form 9.44C), Wis. Stat. §§ 801.02(7)(d), 802.05(3)(c); (3) a certified copy of the inmate's trust-fund account statement for the last six months, Wis. Stat. § 814.29(1m)(b)2.; and (4) a copy of the authorization to the DOC facility holding the prisoner's trust-fund account allowing funds to be forwarded to the court for payment of costs and fees when the balance exceeds $10 (*infra* Form 9.44D), Wis. Stat. § 814.29(1m)(c)2. If the prisoner is initiating an action relating to prison or jail conditions, the prisoner must also attach documentation showing exhaustion of all available administrative remedies. Wis. Stat. § 801.02(7)(c). The prisoner must provide two copies of the petition for fee waiver and the attached documentation to the court, along with sufficient copies of all documentation to be served on the defendants-respondents.

To obtain a copy of the DOJ's certification form regarding prior dismissals, the attorney can contact the DOJ's Division of Legal Services at (608) 266-0320. A copy of the prisoner's trust-fund account statement can be obtained by contacting the business office or inmate accounts office of the DOC facility in which the prisoner is located. There is a fee associated with obtaining a certified copy of the trust-fund account statement.

The prisoner may have to obtain an order waiving fees and costs before the writ is filed; the clerk may not accept the writ for filing without either such an order or the filing fee. The petitioner's attorney should check the local rules or practice for the correct procedure.

In *State ex rel. Speener v. Gudmanson*, 2000 WI App 78, ¶ 14, 234 Wis. 2d 461, 610 N.W.2d 136, the court concluded that inmates incarcerated out of state are not subject to the PLRA's provisions. Therefore, inmates housed in these types of facilities should file a request for waiver of the filing fee in the same manner as nonprisoners, following the procedure established by Wis. Stat. § 814.29(1)(b) for indigent litigants. *See Marth*, 224 Wis. 2d at 584. They should complete Form 9.44F, the Petition for Waiver of Fees and Costs—Affidavit of Indigency and Order, *infra*, together with Form 9.44B, Order on Petition for

Waiver of Fees and Costs, as attachments to the writ. A copy of the petitioner's petition, complaint, answer, or appeal must accompany the petition for waiver.

Distribution

Form 9.44A
Original: Court file
Copy: Client; client file; DOJ (after court enters order, see Form 9.44E, *infra*); district attorney

Form 9.44B (Court completes)
Original: Court file
Copy: Client; client file; DOJ (after court enters order, see Form 9.44E, *infra*); district attorney

Form 9.44C (Completed form obtained from the DOJ)
Original: Court file
Copy: Client; client file; district attorney

Form 9.44D
Original: Court file
Copy: Client; client file; district attorney

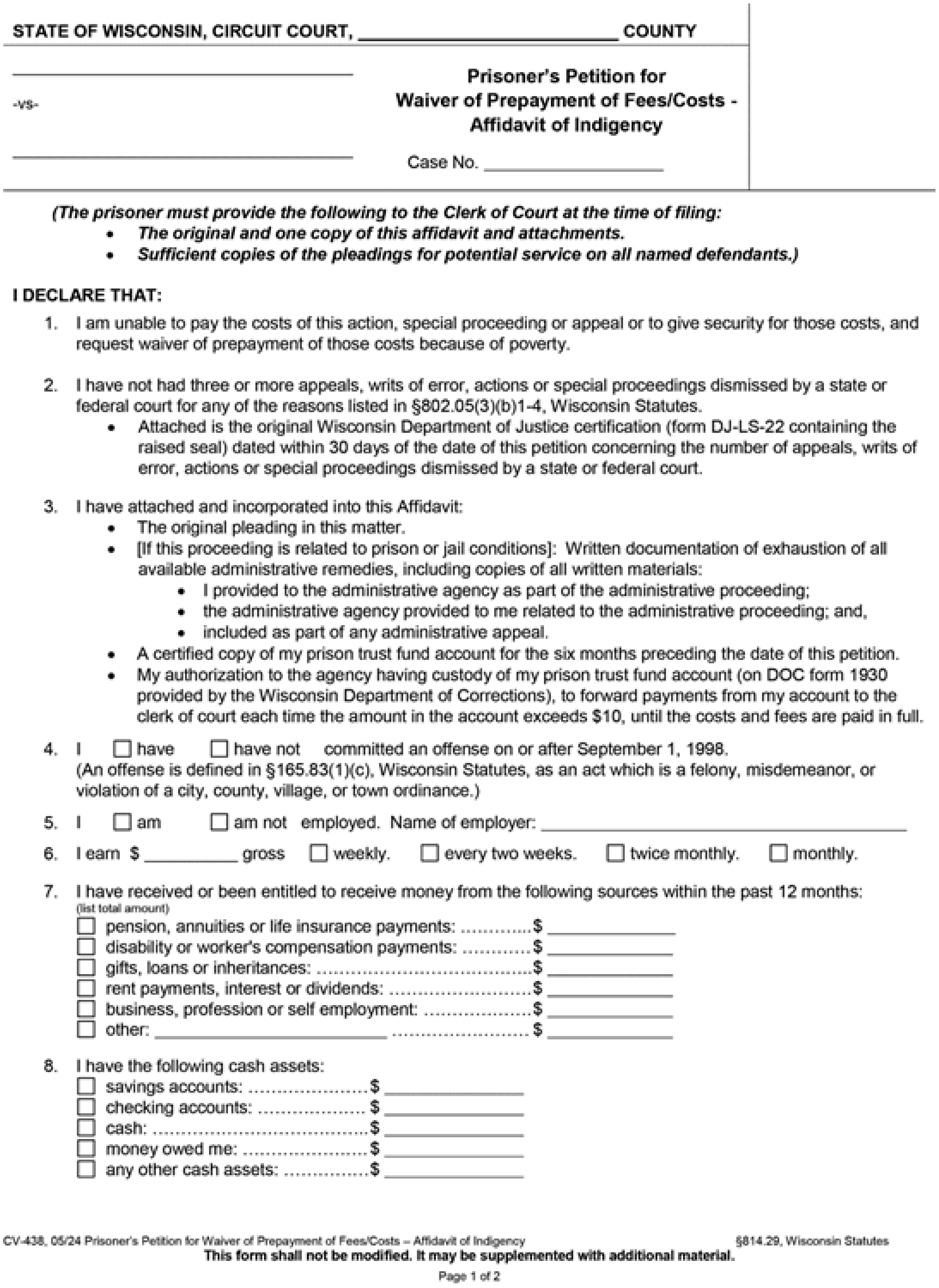
Form 9.44E (Court completes)
Original: Clerk of court
Copy: Client; client file; DOJ (Civil Litigation Unit, P.O. Box 7857,
Madison, WI 53707-7857); DOC facility at which client is incarcerated,
or Dodge Correctional Institution, if client is housed out of state; district attorney

> ***Note.*** The defense attorney submits Form 9.44E, *infra*, as a proposed order for court approval.

Form 9.44F
Original: Court file
Copy: Client; client file; district attorney

Notes

Form 9.44A Prisoner's Petition for Waiver of Prepayment of Fees and Costs—Affidavit of Indigency (CRM-0129)



STATE OF WISCONSIN, CIRCUIT COURT, __________________________ COUNTY

____

-vs-

____

Prisoner's Petition for
Waiver of Prepayment of Fees/Costs -
Affidavit of Indigency

Case No. ____________________

(The prisoner must provide the following to the Clerk of Court at the time of filing:

- ***The original and one copy of this affidavit and attachments.***
- ***Sufficient copies of the pleadings for potential service on all named defendants.)***

I DECLARE THAT:

1. I am unable to pay the costs of this action, special proceeding or appeal or to give security for those costs, and request waiver of prepayment of those costs because of poverty.

2. I have not had three or more appeals, writs of error, actions or special proceedings dismissed by a state or federal court for any of the reasons listed in §802.05(3)(b)1-4, Wisconsin Statutes.
   - Attached is the original Wisconsin Department of Justice certification (form DJ-LS-22 containing the raised seal) dated within 30 days of the date of this petition concerning the number of appeals, writs of error, actions or special proceedings dismissed by a state or federal court.

3. I have attached and incorporated into this Affidavit:
   - The original pleading in this matter.
   - [If this proceeding is related to prison or jail conditions]: Written documentation of exhaustion of all available administrative remedies, including copies of all written materials:
     - I provided to the administrative agency as part of the administrative proceeding;
     - the administrative agency provided to me related to the administrative proceeding; and,
     - included as part of any administrative appeal.
   - A certified copy of my prison trust fund account for the six months preceding the date of this petition.
   - My authorization to the agency having custody of my prison trust fund account (on DOC form 1930 provided by the Wisconsin Department of Corrections), to forward payments from my account to the clerk of court each time the amount in the account exceeds $10, until the costs and fees are paid in full.

4. I ☐ have ☐ have not committed an offense on or after September 1, 1998.
   (An offense is defined in §165.83(1)(c), Wisconsin Statutes, as an act which is a felony, misdemeanor, or violation of a city, county, village, or town ordinance.)

5. I ☐ am ☐ am not employed. Name of employer: ____

6. I earn $ __________ gross ☐ weekly. ☐ every two weeks. ☐ twice monthly. ☐ monthly.

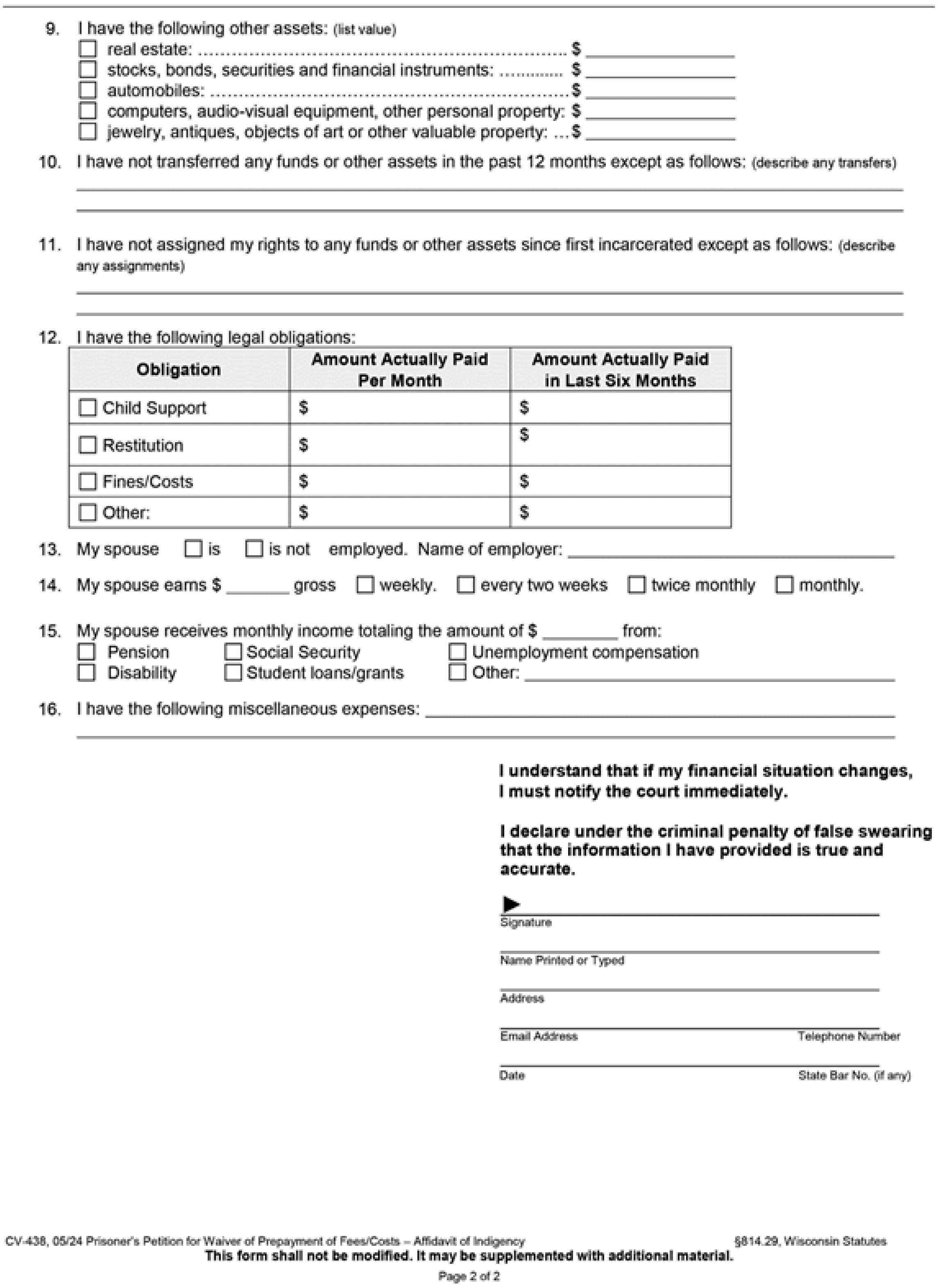
7. I have received or been entitled to receive money from the following sources within the past 12 months:
   (list total amount)
   ☐ pension, annuities or life insurance payments: ....$ ______________
   ☐ disability or worker's compensation payments: ....$ ______________
   ☐ gifts, loans or inheritances: ....$ ______________
   ☐ rent payments, interest or dividends: ....$ ______________
   ☐ business, profession or self employment: ....$ ______________
   ☐ other: __________________________ .... $ ______________

8. I have the following cash assets:
   ☐ savings accounts: ....$ ________________
   ☐ checking accounts: .... $ ________________
   ☐ cash: ....$ ________________
   ☐ money owed me: ....$ ________________
   ☐ any other cash assets: ....$ ________________

CV-438, 05/24 Prisoner's Petition for Waiver of Prepayment of Fees/Costs – Affidavit of Indigency §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 2



9. I have the following other assets: (list value)
   - ☐ real estate: .... $ ________________
   - ☐ stocks, bonds, securities and financial instruments: .... $ ________________
   - ☐ automobiles: .... $ ________________
   - ☐ computers, audio-visual equipment, other personal property: $ ________________
   - ☐ jewelry, antiques, objects of art or other valuable property: ... $ ________________

10. I have not transferred any funds or other assets in the past 12 months except as follows: (describe any transfers)

____

____

11. I have not assigned my rights to any funds or other assets since first incarcerated except as follows: (describe any assignments)

____

____

12. I have the following legal obligations:

Obligation	Amount Actually Paid Per Month	Amount Actually Paid in Last Six Months
☐ Child Support	$	$
☐ Restitution	$	$
☐ Fines/Costs	$	$
☐ Other:	$	$

13. My spouse ☐ is ☐ is not employed. Name of employer: ______________________________

14. My spouse earns $ _______ gross ☐ weekly. ☐ every two weeks ☐ twice monthly ☐ monthly.

15. My spouse receives monthly income totaling the amount of $ ________ from:
    - ☐ Pension ☐ Social Security ☐ Unemployment compensation
    - ☐ Disability ☐ Student loans/grants ☐ Other: ______________________________

16. I have the following miscellaneous expenses: ______________________________________

____

I understand that if my financial situation changes, I must notify the court immediately.

I declare under the criminal penalty of false swearing that the information I have provided is true and accurate.

▶ ______________________________
Signature

____
Name Printed or Typed

____
Address

____
Email Address Telephone Number

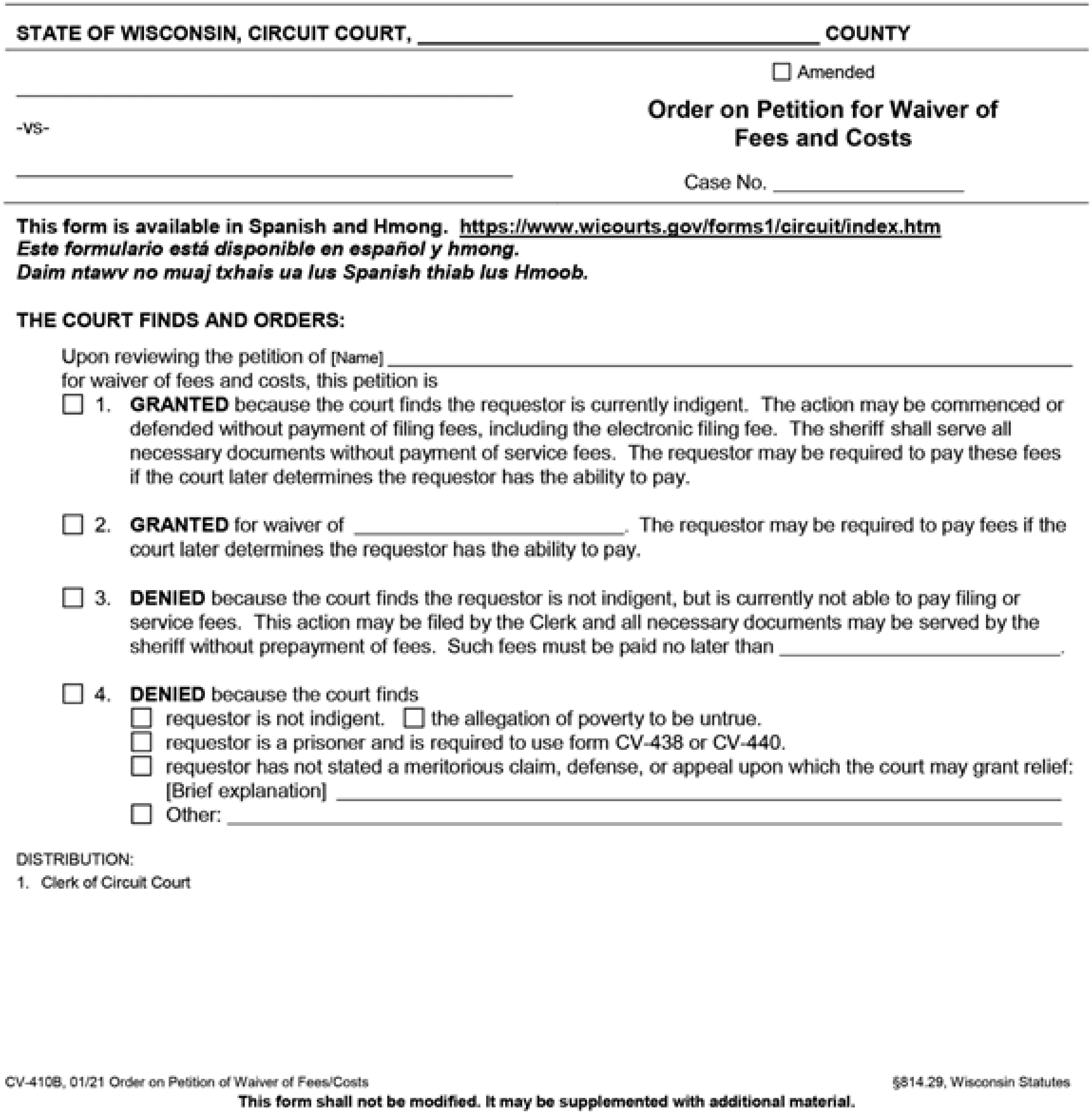
____
Date State Bar No. (if any)

CV-438, 05/24 Prisoner's Petition for Waiver of Prepayment of Fees/Costs – Affidavit of Indigency §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

Form 9.44B Order on Petition for Waiver of Fees and Costs (CRM-0130)



STATE OF WISCONSIN, CIRCUIT COURT, ________________________ COUNTY

☐ Amended

____

-vs-

____

Order on Petition for Waiver of Fees and Costs

Case No. ______________

This form is available in Spanish and Hmong. https://www.wicourts.gov/forms1/circuit/index.htm
Este formulario está disponible en español y hmong.
Daim ntawv no muaj txhais ua lus Spanish thiab lus Hmoob.

THE COURT FINDS AND ORDERS:

Upon reviewing the petition of [Name] ______________________________________ for waiver of fees and costs, this petition is

☐ 1. **GRANTED** because the court finds the requestor is currently indigent. The action may be commenced or defended without payment of filing fees, including the electronic filing fee. The sheriff shall serve all necessary documents without payment of service fees. The requestor may be required to pay these fees if the court later determines the requestor has the ability to pay.

☐ 2. **GRANTED** for waiver of ____________________. The requestor may be required to pay fees if the court later determines the requestor has the ability to pay.

☐ 3. **DENIED** because the court finds the requestor is not indigent, but is currently not able to pay filing or service fees. This action may be filed by the Clerk and all necessary documents may be served by the sheriff without prepayment of fees. Such fees must be paid no later than ____________________.

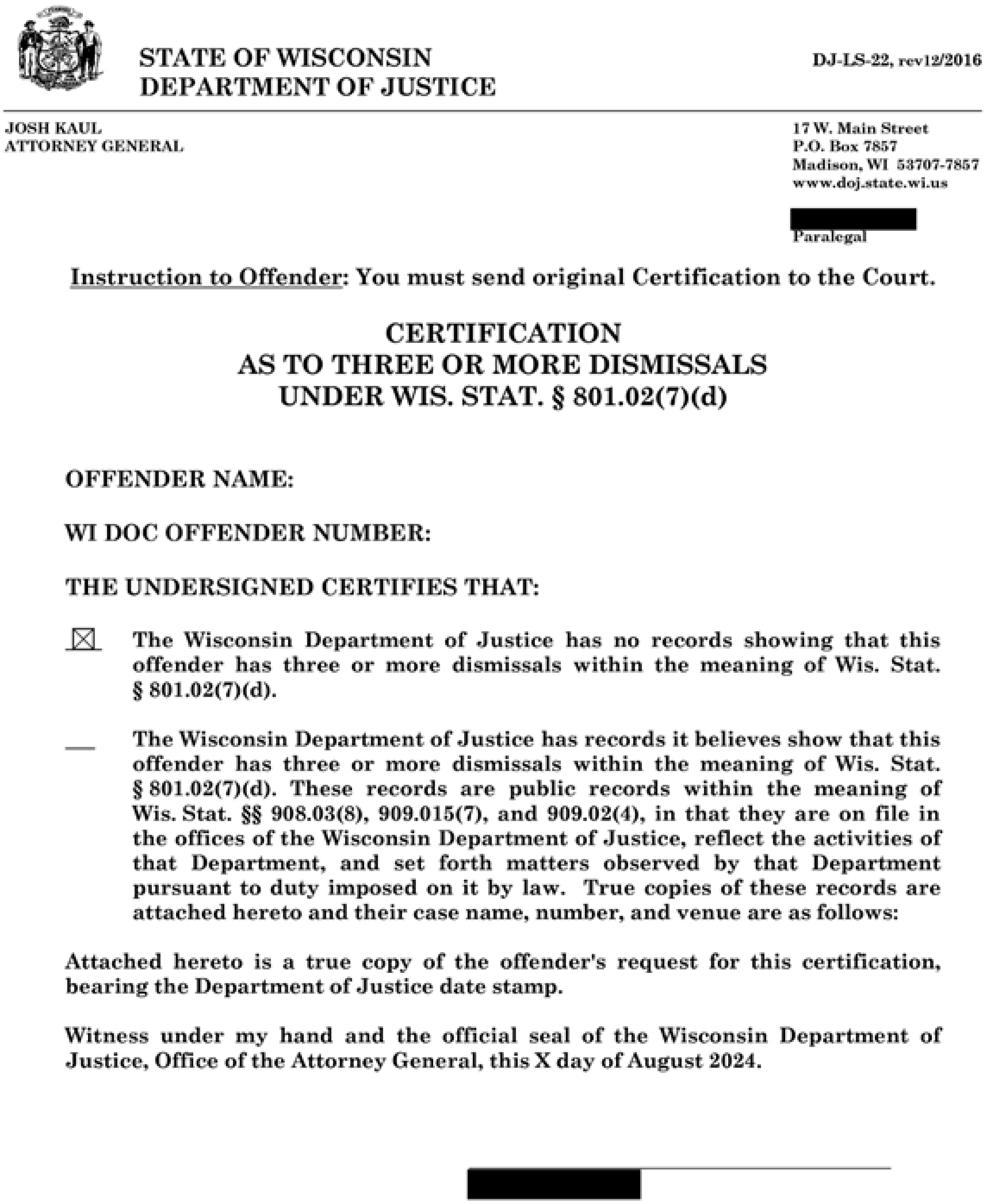
☐ 4. **DENIED** because the court finds
  ☐ requestor is not indigent. ☐ the allegation of poverty to be untrue.
  ☐ requestor is a prisoner and is required to use form CV-438 or CV-440.
  ☐ requestor has not stated a meritorious claim, defense, or appeal upon which the court may grant relief: [Brief explanation] ______________________________________
  ☐ Other: ______________________________________

DISTRIBUTION:
1. Clerk of Circuit Court

CV-410B, 01/21 Order on Petition of Waiver of Fees/Costs §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Form 9.44C Wisconsin Department of Justice Certification Form as to Prior Dismissal(s) (DOJ Form DJ-LS-22) (CRM-0131)



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DJ-LS-22, rev12/2016

JOSH KAUL
ATTORNEY GENERAL

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

[redacted]
Paralegal

Instruction to Offender: You must send original Certification to the Court.

CERTIFICATION
AS TO THREE OR MORE DISMISSALS
UNDER WIS. STAT. § 801.02(7)(d)

OFFENDER NAME:

WI DOC OFFENDER NUMBER:

THE UNDERSIGNED CERTIFIES THAT:

☒ The Wisconsin Department of Justice has no records showing that this offender has three or more dismissals within the meaning of Wis. Stat. § 801.02(7)(d).

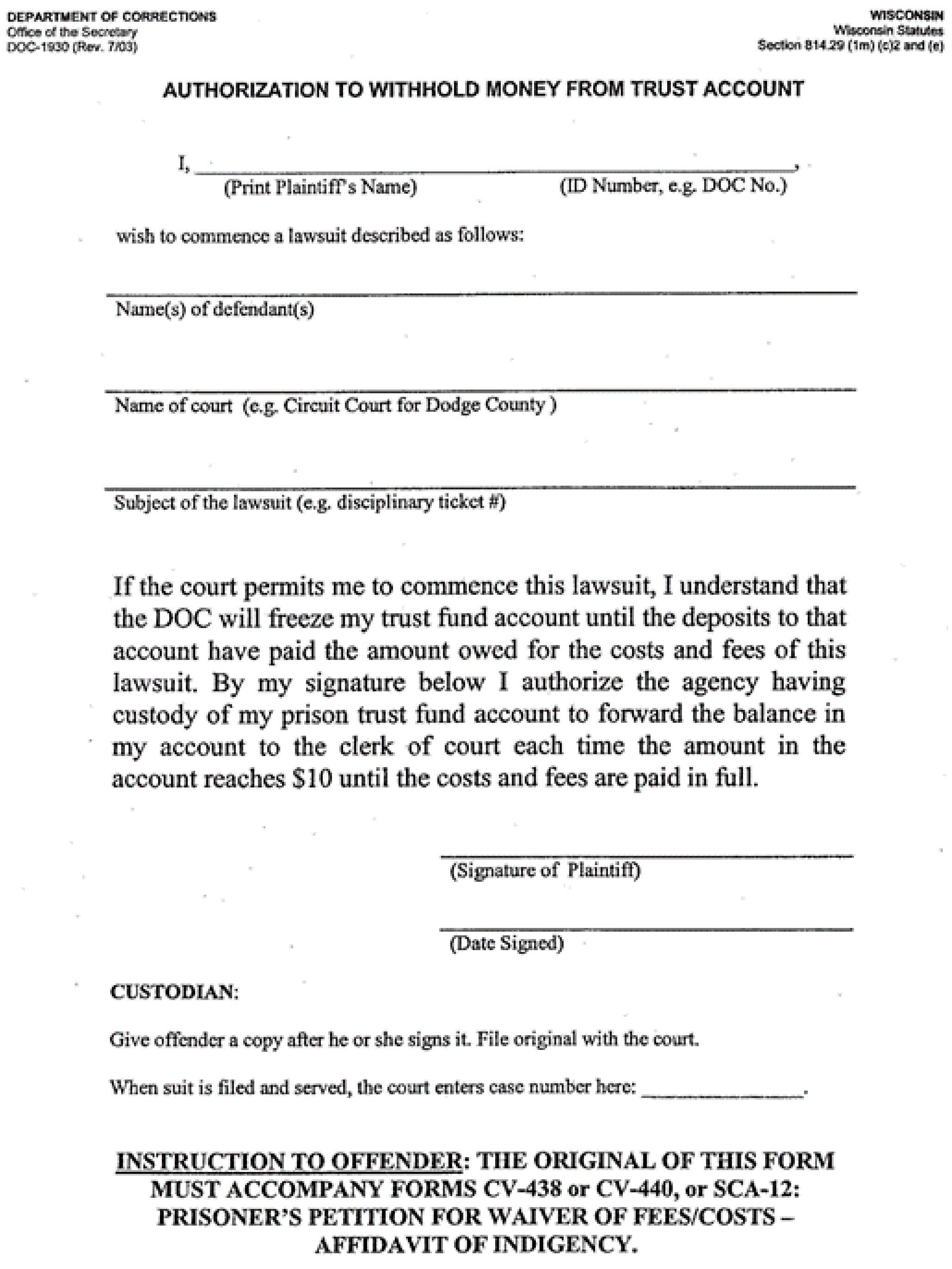
___ The Wisconsin Department of Justice has records it believes show that this offender has three or more dismissals within the meaning of Wis. Stat. § 801.02(7)(d). These records are public records within the meaning of Wis. Stat. §§ 908.03(8), 909.015(7), and 909.02(4), in that they are on file in the offices of the Wisconsin Department of Justice, reflect the activities of that Department, and set forth matters observed by that Department pursuant to duty imposed on it by law. True copies of these records are attached hereto and their case name, number, and venue are as follows:

Attached hereto is a true copy of the offender's request for this certification, bearing the Department of Justice date stamp.

Witness under my hand and the official seal of the Wisconsin Department of Justice, Office of the Attorney General, this X day of August 2024.

[redacted]

Form 9.44D Authorization to Withhold Money from Trust Account (CRM-0132)



DEPARTMENT OF CORRECTIONS
Office of the Secretary
DOC-1930 (Rev. 7/03)

WISCONSIN
Wisconsin Statutes
Section 814.29 (1m) (c)2 and (e)

AUTHORIZATION TO WITHHOLD MONEY FROM TRUST ACCOUNT

I, ______________________________________, ____________
(Print Plaintiff's Name) (ID Number, e.g. DOC No.)

wish to commence a lawsuit described as follows:

____
Name(s) of defendant(s)

____
Name of court (e.g. Circuit Court for Dodge County)

____
Subject of the lawsuit (e.g. disciplinary ticket #)

If the court permits me to commence this lawsuit, I understand that the DOC will freeze my trust fund account until the deposits to that account have paid the amount owed for the costs and fees of this lawsuit. By my signature below I authorize the agency having custody of my prison trust fund account to forward the balance in my account to the clerk of court each time the amount in the account reaches $10 until the costs and fees are paid in full.

____
(Signature of Plaintiff)

____
(Date Signed)

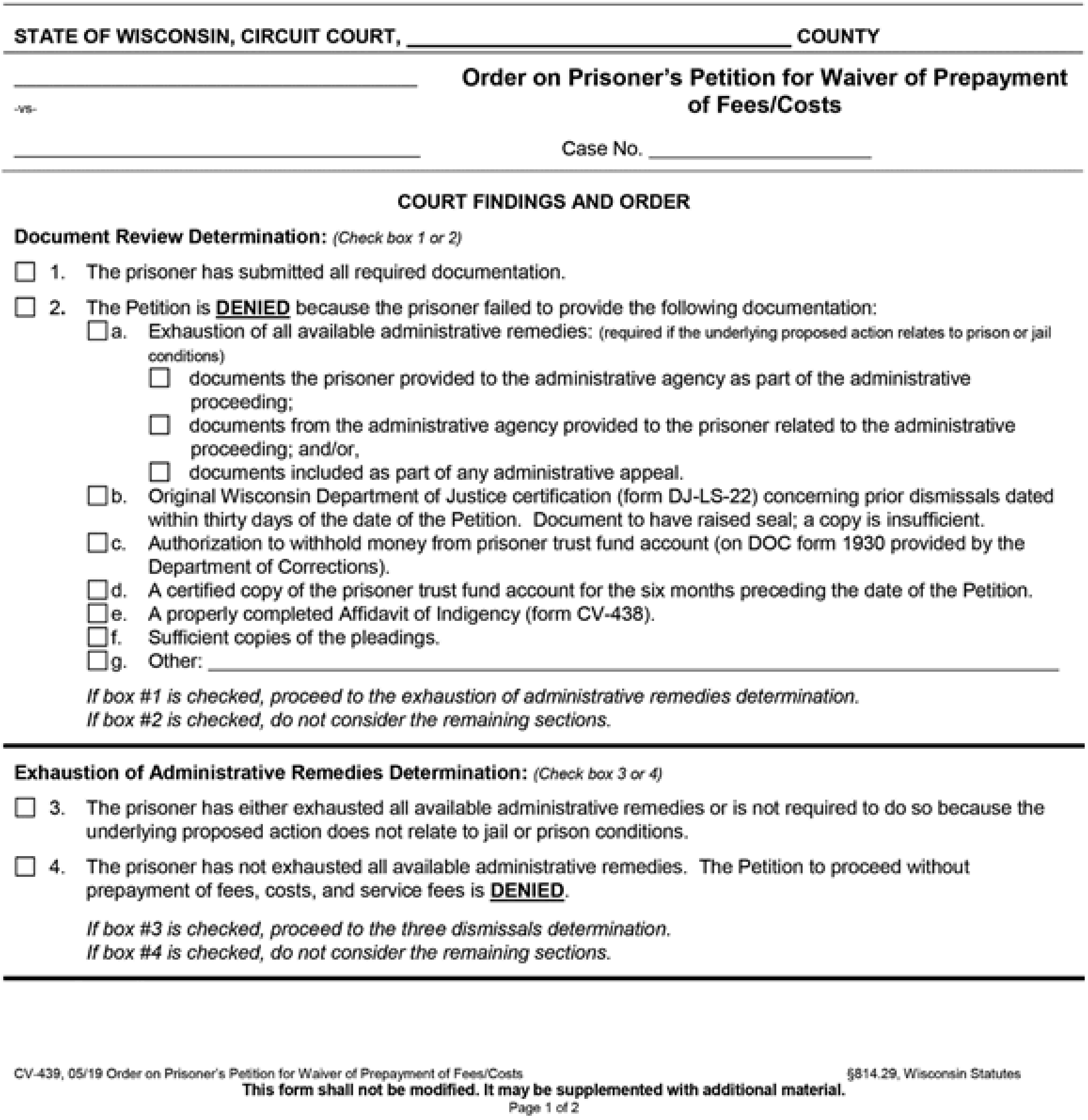
CUSTODIAN:

Give offender a copy after he or she signs it. File original with the court.

When suit is filed and served, the court enters case number here: ________________.

INSTRUCTION TO OFFENDER: THE ORIGINAL OF THIS FORM MUST ACCOMPANY FORMS CV-438 or CV-440, or SCA-12: PRISONER'S PETITION FOR WAIVER OF FEES/COSTS – AFFIDAVIT OF INDIGENCY.

Form 9.44E Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs (CRM-0133)



STATE OF WISCONSIN, CIRCUIT COURT, ________________________________ COUNTY

____

-vs-

____

Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs

Case No. ____________________

COURT FINDINGS AND ORDER

Document Review Determination: *(Check box 1 or 2)*

☐ 1. The prisoner has submitted all required documentation.

☐ 2. The Petition is **DENIED** because the prisoner failed to provide the following documentation:
  - ☐a. Exhaustion of all available administrative remedies: (required if the underlying proposed action relates to prison or jail conditions)
    - ☐ documents the prisoner provided to the administrative agency as part of the administrative proceeding;
    - ☐ documents from the administrative agency provided to the prisoner related to the administrative proceeding; and/or,
    - ☐ documents included as part of any administrative appeal.
  - ☐b. Original Wisconsin Department of Justice certification (form DJ-LS-22) concerning prior dismissals dated within thirty days of the date of the Petition. Document to have raised seal; a copy is insufficient.
  - ☐c. Authorization to withhold money from prisoner trust fund account (on DOC form 1930 provided by the Department of Corrections).
  - ☐d. A certified copy of the prisoner trust fund account for the six months preceding the date of the Petition.
  - ☐e. A properly completed Affidavit of Indigency (form CV-438).
  - ☐f. Sufficient copies of the pleadings.
  - ☐g. Other: ____

If box #1 is checked, proceed to the exhaustion of administrative remedies determination.
If box #2 is checked, do not consider the remaining sections.

Exhaustion of Administrative Remedies Determination: *(Check box 3 or 4)*

☐ 3. The prisoner has either exhausted all available administrative remedies or is not required to do so because the underlying proposed action does not relate to jail or prison conditions.

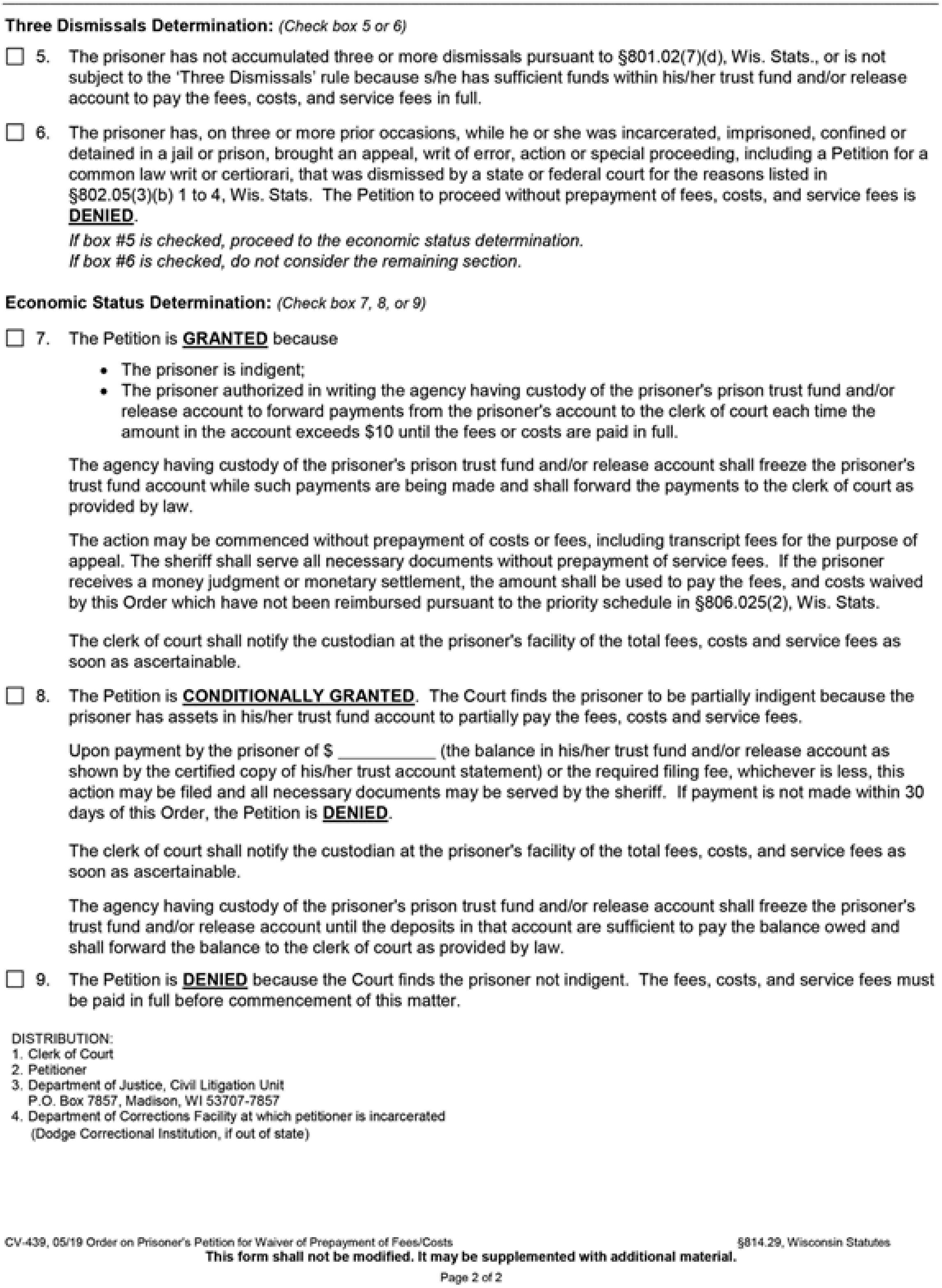
☐ 4. The prisoner has not exhausted all available administrative remedies. The Petition to proceed without prepayment of fees, costs, and service fees is **DENIED**.

If box #3 is checked, proceed to the three dismissals determination.
If box #4 is checked, do not consider the remaining sections.

CV-439, 05/19 Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 2



Three Dismissals Determination: *(Check box 5 or 6)*

☐ 5. The prisoner has not accumulated three or more dismissals pursuant to §801.02(7)(d), Wis. Stats., or is not subject to the 'Three Dismissals' rule because s/he has sufficient funds within his/her trust fund and/or release account to pay the fees, costs, and service fees in full.

☐ 6. The prisoner has, on three or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a Petition for a common law writ or certiorari, that was dismissed by a state or federal court for the reasons listed in §802.05(3)(b) 1 to 4, Wis. Stats. The Petition to proceed without prepayment of fees, costs, and service fees is **DENIED**.

If box #5 is checked, proceed to the economic status determination.
If box #6 is checked, do not consider the remaining section.

Economic Status Determination: *(Check box 7, 8, or 9)*

☐ 7. The Petition is **GRANTED** because

- The prisoner is indigent;
- The prisoner authorized in writing the agency having custody of the prisoner's prison trust fund and/or release account to forward payments from the prisoner's account to the clerk of court each time the amount in the account exceeds $10 until the fees or costs are paid in full.

The agency having custody of the prisoner's prison trust fund and/or release account shall freeze the prisoner's trust fund account while such payments are being made and shall forward the payments to the clerk of court as provided by law.

The action may be commenced without prepayment of costs or fees, including transcript fees for the purpose of appeal. The sheriff shall serve all necessary documents without prepayment of service fees. If the prisoner receives a money judgment or monetary settlement, the amount shall be used to pay the fees, and costs waived by this Order which have not been reimbursed pursuant to the priority schedule in §806.025(2), Wis. Stats.

The clerk of court shall notify the custodian at the prisoner's facility of the total fees, costs and service fees as soon as ascertainable.

☐ 8. The Petition is **CONDITIONALLY GRANTED**. The Court finds the prisoner to be partially indigent because the prisoner has assets in his/her trust fund account to partially pay the fees, costs and service fees.

Upon payment by the prisoner of $ ___________ (the balance in his/her trust fund and/or release account as shown by the certified copy of his/her trust account statement) or the required filing fee, whichever is less, this action may be filed and all necessary documents may be served by the sheriff. If payment is not made within 30 days of this Order, the Petition is **DENIED**.

The clerk of court shall notify the custodian at the prisoner's facility of the total fees, costs, and service fees as soon as ascertainable.

The agency having custody of the prisoner's prison trust fund and/or release account shall freeze the prisoner's trust fund and/or release account until the deposits in that account are sufficient to pay the balance owed and shall forward the balance to the clerk of court as provided by law.

☐ 9. The Petition is **DENIED** because the Court finds the prisoner not indigent. The fees, costs, and service fees must be paid in full before commencement of this matter.

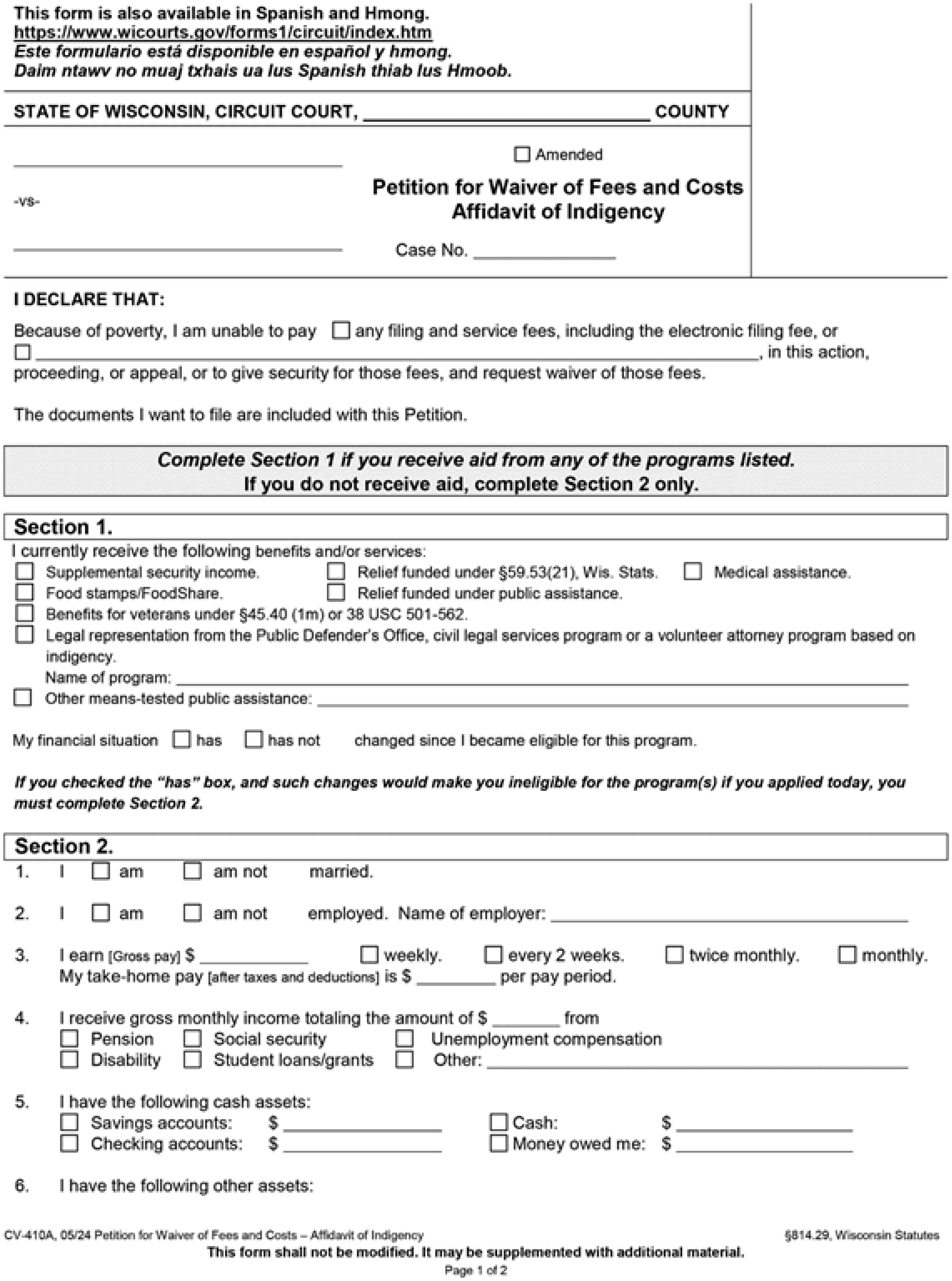
DISTRIBUTION:
1. Clerk of Court
2. Petitioner
3. Department of Justice, Civil Litigation Unit
   P.O. Box 7857, Madison, WI 53707-7857
4. Department of Corrections Facility at which petitioner is incarcerated
   (Dodge Correctional Institution, if out of state)

CV-439, 05/19 Order on Prisoner's Petition for Waiver of Prepayment of Fees/Costs §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

Form 9.44F Petition for Waiver of Fees and Costs—Affidavit of Indigency (CRM-0134)



This form is also available in Spanish and Hmong.
https://www.wicourts.gov/forms1/circuit/index.htm
Este formulario está disponible en español y hmong.
Daim ntawv no muaj txhais ua lus Spanish thiab lus Hmoob.

STATE OF WISCONSIN, CIRCUIT COURT, ____________________________ COUNTY

☐ Amended

____

-vs-

____

Petition for Waiver of Fees and Costs
Affidavit of Indigency

Case No. ______________

I DECLARE THAT:

Because of poverty, I am unable to pay ☐ any filing and service fees, including the electronic filing fee, or ☐ ____, in this action, proceeding, or appeal, or to give security for those fees, and request waiver of those fees.

The documents I want to file are included with this Petition.

Complete Section 1 if you receive aid from any of the programs listed.
If you do not receive aid, complete Section 2 only.

Section 1.

I currently receive the following benefits and/or services:

☐ Supplemental security income.
☐ Food stamps/FoodShare.
☐ Relief funded under §59.53(21), Wis. Stats.
☐ Relief funded under public assistance.
☐ Medical assistance.
☐ Benefits for veterans under §45.40 (1m) or 38 USC 501-562.
☐ Legal representation from the Public Defender's Office, civil legal services program or a volunteer attorney program based on indigency.
Name of program: ____
☐ Other means-tested public assistance: ______________________________________

My financial situation ☐ has ☐ has not changed since I became eligible for this program.

If you checked the "has" box, and such changes would make you ineligible for the program(s) if you applied today, you must complete Section 2.

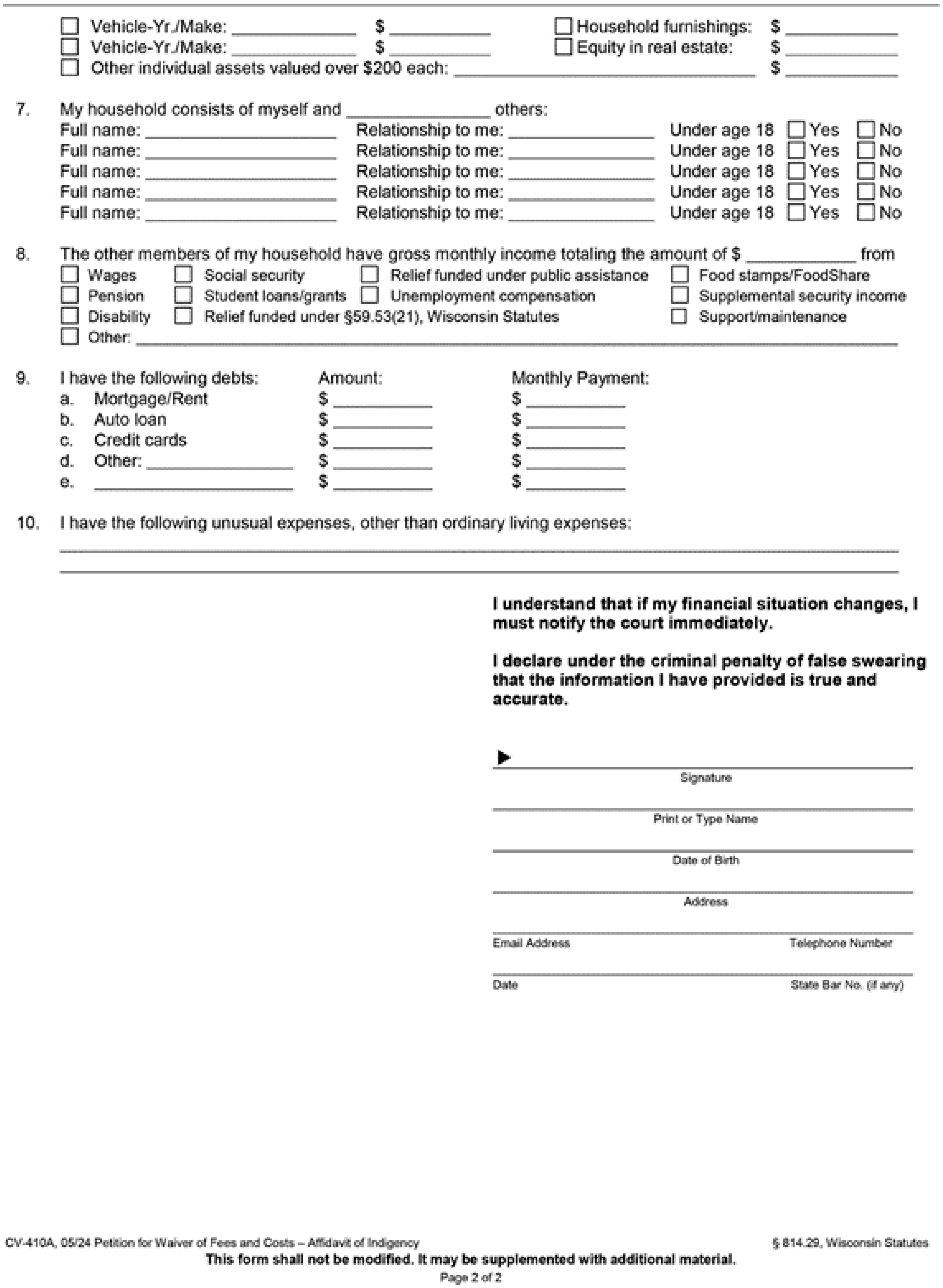
Section 2.

1. I ☐ am ☐ am not married.
2. I ☐ am ☐ am not employed. Name of employer: ______________________________
3. I earn [Gross pay] $ ___________ ☐ weekly. ☐ every 2 weeks. ☐ twice monthly. ☐ monthly.
My take-home pay [after taxes and deductions] is $ ________ per pay period.
4. I receive gross monthly income totaling the amount of $ _______ from
☐ Pension ☐ Social security ☐ Unemployment compensation
☐ Disability ☐ Student loans/grants ☐ Other: ______________________________
5. I have the following cash assets:
☐ Savings accounts: $ _______________ ☐ Cash: $ _______________
☐ Checking accounts: $ _______________ ☐ Money owed me: $ _______________
6. I have the following other assets:

CV-410A, 05/24 Petition for Waiver of Fees and Costs – Affidavit of Indigency §814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 2



☐ Vehicle-Yr./Make: ______________ $ ___________ ☐ Household furnishings: $ ____________
☐ Vehicle-Yr./Make: ______________ $ ___________ ☐ Equity in real estate: $ ____________
☐ Other individual assets valued over $200 each: __________________________________ $ ____________

7. My household consists of myself and ________________ others:
Full name: ____________________ Relationship to me: _______________ Under age 18 ☐ Yes ☐ No
Full name: ____________________ Relationship to me: _______________ Under age 18 ☐ Yes ☐ No
Full name: ____________________ Relationship to me: _______________ Under age 18 ☐ Yes ☐ No
Full name: ____________________ Relationship to me: _______________ Under age 18 ☐ Yes ☐ No
Full name: ____________________ Relationship to me: _______________ Under age 18 ☐ Yes ☐ No

8. The other members of my household have gross monthly income totaling the amount of $ ____________ from
☐ Wages ☐ Social security ☐ Relief funded under public assistance ☐ Food stamps/FoodShare
☐ Pension ☐ Student loans/grants ☐ Unemployment compensation ☐ Supplemental security income
☐ Disability ☐ Relief funded under §59.53(21), Wisconsin Statutes ☐ Support/maintenance
☐ Other: ____

9. I have the following debts:	Amount:	Monthly Payment:
a. Mortgage/Rent	$ ___________	$ ___________
b. Auto loan	$ ___________	$ ___________
c. Credit cards	$ ___________	$ ___________
d. Other: ________________	$ ___________	$ ___________
e. ______________________	$ ___________	$ ___________

10. I have the following unusual expenses, other than ordinary living expenses:
____
____

I understand that if my financial situation changes, I must notify the court immediately.

I declare under the criminal penalty of false swearing that the information I have provided is true and accurate.

▶ ____________________________________
Signature

____
Print or Type Name

____
Date of Birth

____
Address

____
Email Address Telephone Number

____
Date State Bar No. (if any)

CV-410A, 05/24 Petition for Waiver of Fees and Costs – Affidavit of Indigency § 814.29, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

VI. Writ of Habeas Corpus [§ 9.45]

Commentary and Instructions for Forms 9.45A–9.45C

Form 9.45A	Petition for Writ of Habeas Corpus (CRM-0135)
Form 9.45B	Writ of Habeas Corpus (CRM-0136)
Form 9.45C	Order Granting Writ of Habeas Corpus (CRM-0137)

The purpose of a writ of habeas corpus is to require the petitioner to be brought before the court to determine the lawfulness of his or her imprisonment. Habeas corpus is intended as a method of vindicating a person's right to personal liberty by freeing the person from illegal restraint. *J.V. v. Barron*, 112 Wis. 2d 256, 332 N.W.2d 796 (1983); *In re Ziegler*, 245 Wis. 453, 15 N.W.2d 34 (1944). Attorneys should consider the availability of other adequate remedies before using the writ procedure. *See supra* § 9.32.

Habeas corpus is governed in Wisconsin by Wis. Const. art. I, § 8, Wis. Stat. chs. 781 and 782, and Wis. Stat. § 801.50(4). Wis. Stat. ch. 782 outlines the traditional procedure for applying for a writ of habeas corpus in the circuit court. Several statutory changes have sought to eliminate much of the technicality and formality of the old forms of pleading. Wis. Stat. § 781.01 declares that a writ is not necessary; the remedy "may be granted by the final judgment or allowed as a provisional remedy in an action or proceeding." What this language apparently means is that the remedy of habeas corpus may be sought through the procedures normally employed in civil actions; that is, by filing a complaint and summons. The new procedure does not alter the nature of the remedy or the scope of the proceedings, including, without limitation, the relief available, discovery, the availability of a jury trial, and the burden of proof.

The availability of this new procedure notwithstanding, attorneys may use the writ procedure detailed in Wis. Stat. ch. 782. Application for a writ of habeas corpus is by petition. *See* Wis. Stat. § 782.03. The petition must be "verified," Wis. Stat. § 782.04, which simply means that the petition must be notarized. The plaintiff is the state of Wisconsin on the relation of (*ex rel.*) the petitioner. The respondent is the person charged with unlawfully restraining the petitioner, usually the county sheriff. *See, e.g.*, *State ex rel. Reynolds v. Flynn*, 180 Wis. 556, 193 N.W. 651 (1923). Any other party interested in the petitioner's continued imprisonment may be named as a respondent and is entitled to intervene and be heard. *State ex rel. Hellige v. Milwaukee Liedertafel*, 166 Wis. 277, 164 N.W. 1004 (1917). In cases arising out of criminal proceedings, the petitioner must give "sufficient notice" of the time and place of the hearing to the district attorney of the county in which the criminal action arises. Wis. Stat. §§ 781.04(2), 782.26, 782.27.

Wis. Stat. § 782.04 sets forth the requirements for the contents of the petition:

1. The petition must state that the petitioner is restrained of personal liberty, and it must identify the person by whom and the place where the petitioner is imprisoned. The petition must name the parties, if their names are known. If their names are not known, the petition must describe the parties.

2. The petition must include an assertion that the petitioner is not imprisoned by virtue of any judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such a judgment or order.

3. The petition must contain a statement of knowledge, or of information and belief, of the "cause or pretense" of the petitioner's imprisonment.

4. If the petitioner is imprisoned by virtue of any order or process, the petitioner must attach a copy of the order or process to the petition; alternatively, the petition must aver that, by reason of the prisoner's removal or concealment, a demand for a copy could not be made, or that a demand was made and a fee of one dollar was tendered to the person having the prisoner in custody and that the copy was refused.

5. The petition must state why the petitioner's imprisonment is illegal.

4. If the petition is made by or on behalf of a person sentenced to the state prison, it must contain a copy of any motion made under Wis. Stat. § 974.06, and indicate the disposition of the motion and the court in which the disposition was made. Wis. Stat. § 782.03; *see* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.25 (Motion for Postconviction Relief Under Wis. Stat. § 974.06). If no motion was made, the petition must so state. Wis. Stat. § 782.03.

The procedure for filing writs of habeas corpus in the circuit courts varies from county to county; the attorney should always determine the local court rules for filing and hearing writs. What follows is a typical procedure:

1. The petitioner files the action with the clerk of court, usually the clerk handling civil matters. A filing fee is generally required, unless the action is being filed by, or on behalf of, an indigent client (i.e., *in forma pauperis*). The clerk assigns a file number, which must be placed on all copies of the writ being served. Generally, the clerk assigns a civil case number. All copies of the writ should be file-stamped as proof of filing.

2. If the indigent client is a prisoner within the definition of Wis. Stat. § 801.02(7)(a)2., specific documents must be attached to the petition, as described in section 9.36, *supra*. *See also supra* Forms 9.44A–9.44D. For other indigent clients, Form 9.44F, *supra*, should accompany the petition.

3. After the matter has been filed and assigned to a specific judge, a date will be set for a hearing on the writ. Scheduling might be done by the clerk or the specific court, depending on local practice. The date is then entered on the writ of habeas corpus (*infra* Form 9.45B). All parties listed as respondents must then be served with copies of the writ. If the local district attorney is not named as a respondent, he or she must still be served. *See* Wis. Stat. §§ 781.04(2), 782.27.

The *writ*, i.e., the order requiring the respondent to bring the petitioner to court for the hearing, must be granted without delay, unless it appears from the petition and the attached documents that the party applying is not entitled to prosecute the writ. Wis. Stat. § 782.06; *see State ex rel. Reynolds v. Kenosha Cnty. Ct.*, 11 Wis. 2d 560, 105 N.W.2d 876 (1960). A judge who willfully refuses to grant a legally sufficient writ will be liable to the petitioner in the amount of $1,000. Wis. Stat. § 782.09.

A petitioner may apply to the court of appeals or the supreme court for a writ of habeas corpus, as well as to the circuit court. Wis. Stat. § 782.03. Writ procedure in the appeals courts is governed by Wis. Stat. §§ 809.51 and 809.52. *See* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.35.

Distribution

Forms 9.45A–9.45C

Original:	E-file with the court hearing the writ
Copy:	Sheriff; warden or other person having custody of the client; client; client file

Note. The defense attorney submits Forms 9.45B and 9.45C, *infra*, as proposed orders for court approval.

Notes

Form 9.45A Petition for Writ of Habeas Corpus (CRM-0135)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.,
(3.01) (Client's Name)

Petitioner

v.

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

Case No. *(1.02)*

PETITION FOR WRIT OF HABEAS CORPUS

(3.01) (Client's Name), by the undersigned attorney, petitions the court for a writ of habeas corpus requiring the respondent*(s)* to show cause why the petitioner ought not be released from custody. The petitioner brings this petition pursuant to Wis. Stat. ch. 782.

(2.01) (Attorney Handling Case), attorney for the petitioner, alleges and shows to the court the following facts in support of this petition:

1. I am an attorney licensed to practice law in the state of Wisconsin, and I represent and appear for the petitioner in this action.

2. The petitioner is currently *(incarcerated/restrained of personal liberty)* by the respondent*(s)* at *(location where incarcerated or restrained)*.

3. The petitioner is not imprisoned by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such an order or judgment.

4. The petitioner is *(not)* imprisoned in state prison. *(If so imprisoned, include a statement concerning motions made or not made pursuant to Wis. Stat. § 974.06. See Wis. Stat. § 782.03)*

5. The petitioner is imprisoned for the following reasons:

(Here state the reasons why the petitioner is imprisoned. If the petitioner's imprisonment is by virtue of any order or process, a copy of the order or process must be annexed to the petition, or it must be averred that, by reason of the prisoner's removal or concealment, demand for a copy could not be made, or that a demand was made and a fee of one dollar was tendered to the person having the prisoner in custody and that the copy was refused.)

6. The petitioner's imprisonment is illegal for the following reasons:

(State reasons)

The petitioner therefore requests that this court issue a writ of habeas corpus commanding the respondent*(s)* to show cause why the petitioner's imprisonment should not be declared unlawful, and why the petitioner should not be discharged from custody for the reasons set forth in this petition and for those reasons to be presented at the hearing on this petition.

/s/
(2.01) (Attorney Handling Case)
Attorney for Petitioner
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. *(2.02)*

Signed and sworn to before me
on
by ____________________

/s/
Notary Public, State of Wisconsin
My commission ____________________
☐ This notarial act involved the use of communication technology.

Form 9.45B Writ of Habeas Corpus (CRM-0136)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.
(3.01) (Client's Name)

Petitioner

v. Case No. *(1.02)*

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

WRIT OF HABEAS CORPUS

You are hereby commanded to have *(3.01) (Client's Name)*, by whatever name the petitioner shall be called or charged, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment, before the Honorable *(Name of Judge)*, at *(6.02) (Courthouse Address)*, on *(date)*, at *(time)*, to do and receive what shall then and there be considered concerning the petitioner.

Form 9.45C Order Granting Writ of Habeas Corpus (CRM-0137)

STATE OF WISCONSIN	CIRCUIT COURT	*(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.
(3.01) (Client's Name)

Petitioner

v. Case No. *(1.02)*

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

ORDER GRANTING WRIT OF HABEAS CORPUS

(3.01) (Client's Name), having petitioned this court by a writ of habeas corpus for *(his/her)* freedom from further restraint of personal liberty, and the petition having been duly noticed, heard, and decided, and pursuant to Wis. Stat. §§ 782.30 and 782.32:

IT IS ORDERED that the petitioner be freed from the restraint of personal liberty and discharged forthwith.

VII. Writ of Certiorari [§ 9.46]

Commentary and Instructions for Forms 9.46A–9.46C

Form 9.46A	Petition for Writ of Certiorari (CRM-0138)
Form 9.46B	Writ of Certiorari (CRM-0139)
Form 9.46C	Order Granting Writ of Certiorari (CRM-0140)

A petition for writ of certiorari seeks review of a final order or judgment of a lower court or quasi-judicial administrative body. Attorneys should consider the availability of other adequate remedies before using the writ procedure. *See supra* § 9.32. Certiorari is governed in Wisconsin by Wis. Stat. ch. 781 and Wis. Stat. §§ 753.04, 801.50(5), and 893.735. Wis. Stat. § 781.01 declares that a writ is not necessary; the remedy "may be granted by the final judgment or allowed as a provisional remedy in an action or proceeding." This language apparently means that certiorari may be sought through the procedures normally employed in civil actions; thus, certiorari may be pursued by filing a complaint and summons. *But see* Wis. Stat. § 893.735(3) (action seeking relief available by certiorari is deemed commenced when petition for writ of certiorari filed).

The procedure for filing writs of certiorari in the circuit courts varies from county to county; the petitioner's attorney should always determine the local court rules for filing and hearing writs. What follows is a typical procedure:

1. The action is filed with the clerk of court, usually the clerk handling civil matters. A filing fee is generally required, unless the action is being filed on behalf of an indigent client (i.e., *in forma pauperis*). The clerk assigns a file number, which must be placed on all copies of the writ being served. Generally, the clerk of court assigns a civil case number. All copies of the writ should be file stamped as proof of filing.

   A prisoner, as defined in Wis. Stat. § 801.02(7)(a)2., seeking a remedy that is available by writ of certiorari must file a petition for writ of certiorari "within 45 days after the cause of action accrues." Wis. Stat. § 893.735(2). This time limit applies to prisoners challenging revocation of supervision. *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 51, 236 Wis. 2d 473, 613 N.W.2d 591. If the prisoner is requesting waiver of prepayment of costs and fees under Wis. Stat. § 814.29(1m), the 45-day time limit is tolled until the prisoner receives certification from the DOJ indicating whether the prisoner has filed more than three frivolous or "improper" actions or appeals in the past. *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶¶ 26, 32, 242 Wis. 2d 327, 629 N.W.2d 30.

   A request for certiorari relief generally includes the following documents: a petition for writ of certiorari (*infra* Form 9.46A); a writ of certiorari (*infra* Form 9.46B); and an order granting writ of certiorari (*infra* Form 9.46C).

2. If the petitioner seeks a waiver or deferred payment of filing fees, the proper indigency affidavit differs according to whether the petitioner is a prisoner within the definition of Wis. Stat. § 801.02(7)(a)2. A prisoner must attach specific documents to the petition as described in section 9.36, *supra*. Other indigent clients should attach Form 9.44F, *supra*, to the petition.

3. The return on the writ is the record transmitted by the respondent for review. Wis. Stat. § 781.03. The return does not consist of admissions or denials, as an answer normally would. The respondent may file a motion to quash before or after filing the return. *State ex rel. Casper v. Board of Trs.*, 30

Wis. 2d 170, 140 N.W.2d 301 (1966). There is no provision for an evidentiary hearing; review is based entirely on the record created by the petition, the return, and any motion to quash. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 289 N.W.2d 357 (Ct. App. 1980).

4. The petition is on the relation of (*ex rel.*) the petitioner. The respondent is the lower court or quasi-judicial administrative agency whose decision is being challenged (e.g., the DOC). The petition should allege relevant facts and specific errors. *Westgate Hotel, Inc. v. Krumbiegel*, 39 Wis. 2d 108, 158 N.W.2d 362 (1968). Because review on certiorari is limited to the record, a motion to supplement a return should be filed if any relevant documents are not included. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 289 N.W.2d 357 (Ct. App. 1980).

5. After the matter has been filed and assigned to a specific judge, a date must be set for the return to be filed. All parties listed as respondents must then be served with copies of the writ.

Writ procedure in the court of appeals and the supreme court is governed by Wis. Stat. §§ 809.51 and 809.52. *See* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.35.

Distribution

Forms 9.46A–9.46C

Original:	E-file with the court hearing the writ
Copy:	Respondent(s); client; client file

Note. The defense attorney submits Forms 9.46B and 9.46C, *infra*, as proposed orders for court approval.

Notes

Form 9.46A Petition for Writ of Certiorari (CRM-0138)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.,
(3.01) (Client's Name)

Petitioner

v.

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

Case No. *(1.02)*

PETITION FOR WRIT OF HABEAS CORPUS

(3.01) (Client's Name), by the undersigned attorney, petitions the court for a writ of certiorari.

(2.01) (Attorney Handling Case), attorney for the petitioner, alleges and shows to the court the following facts in support of this petition:

1. I am an attorney licensed to practice law in the state of Wisconsin, and I represent and appear for the petitioner in this action.

2. The petitioner is *(state basis for the jurisdiction of the court or quasi-judicial tribunal over the client)*.

3. *(State the grounds for the petition, e.g., the respondent acted without jurisdiction, acted in violation of the petitioner's due process rights, failed to follow its own rules, or acted in an arbitrary and capricious manner so as to represent its will and not its judgment.)*

4. *(Describe the order to be reviewed and state that it is a final order or judgment.)*

The petitioner therefore requests that this court issue a writ of certiorari commanding the respondent*(s)* to return before this court the complete record of the proceedings complained of in this petition and, upon such return, to determine that the actions of the respondent*(s)*, complained of by the petitioner, should be reversed and adjudged null and void.

/s/

(2.01) (Attorney Handling Case)
Attorney for Petitioner
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. *(2.02)*

Signed and sworn to before me
on ____________________
by ____________________

/s/

Notary Public, State of Wisconsin
My commission ________________
☐ This notarial act involved the use of communication technology.

Form 9.46B Writ of Certiorari (CRM-0139)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.
(3.01) (Client's Name)

Petitioner

v. Case No. *(1.02)*

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

WRIT OF CERTIORARI

The attached petition for a writ of certiorari having been presented to this court alleging that the respondent*(s)* acted without jurisdiction, erroneously, arbitrarily and capriciously, and contrary to law; and this court being willing to be certified of all proceedings had in relation to this matter and on which the erroneous determination is founded; the respondent*(s) (is/are)* commanded to certify and return to the clerk of this court within *(specify number)* days after service of this writ on the respondent*(s)*, all records in this matter or such other return as may lawfully be made, together with any legal statement or brief of the position of the respondent*(s)* in this matter, so that this court may further act on this matter as of right and according to law ought to be done.

Form 9.46C Order Granting Writ of Certiorari (CRM-0140)

STATE OF WISCONSIN CIRCUIT COURT *(1.01)* COUNTY

STATE OF WISCONSIN, ex rel.
(3.01) (Client's Name)

Petitioner

v. Case No. *(1.02)*

(Respondent)
(Respondent's official title)
(Name of institution or department)
(his/her) agents, employees, or those acting
by *(his/her)* direction, or on *(his/her)* behalf

Respondent*(s)*

ORDER GRANTING WRIT OF CERTIORARI

(3.01) (Client's Name), having petitioned this court by a writ of certiorari for review of the final actions, judgments, and decisions of the respondent*(s)*, and the petition having been duly noticed and decided:

IT IS ORDERED that the actions of the respondent*(s)* complained of by the petitioner *(describe specific action(s) of respondent(s))* should be, and are, reversed and adjudged null and void.

VIII. Notice of Intent to Pursue Postconviction Relief [§ 9.47]

Commentary and Instructions for Forms 9.47A–9.47B

Form 9.47A	Notice of Intent to Pursue Postconviction Relief (CRM-0141)
Form 9.47B	Sample Letter to State Public Defender Appellate Division (CRM-0142)

The duties of the trial attorney do not end with conviction and sentencing. The attorney must continue to assist the client until the client decides whether to file a notice of intent to pursue postconviction relief under Wis. Stat. § 809.30. It is the trial attorney's obligation to continue representing the defendant during this stage and to assist the defendant in making a reasonable decision.

Wis. Stat. § 809.30 sets forth the procedures for protecting the client's right to appeal from final judgments or orders in criminal cases. *See* Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30, *supra* § 9.7; *see also State v. Schulpius*, 2006 WI 1, ¶ 26, 287 Wis. 2d 44, 707 N.W.2d 495 (holding that when order or judgment disposes of all substantive issues in a case, court intends it to be final order for purposes of appeal).

The duty of "informing a criminal defendant of the right to appeal is divided between the circuit court and defendant's counsel." *Flores v. State*, 183 Wis. 2d 587, 603, 516 N.W.2d 362 (1994). The shared responsibilities are detailed in Wis. Stat. § 973.18. The attorney must review with the defendant Circuit Court Form CR-233, *see supra* Form 8.72A, to ensure that the defendant understands both the right to appeal and the applicable time limit to initiate the process. *See* Wis. Stat. § 973.18(3), (4). Both the attorney and the defendant must sign the form, which is kept in the court record. Wis. Stat. § 973.18(3).

The attorney should also stress the importance of promptly responding to correspondence that the defendant receives from the defendant's attorney or the SPD Appellate Division. The defendant's failure to comply with certain requirements and deadlines may result in the loss of his or her right to appeal.

The defendant must file the notice of intent to pursue postconviction relief within 20 days after the date of sentencing or final adjudication. Wis. Stat. § 809.30(2)(b). The court of appeals may grant an extension of time under Wis. Stat. § 809.82(2)(a). *State v. Harris*, 149 Wis. 2d 943, 440 N.W.2d 364 (1989); *State v. Quackenbush*, 2005 WI App 2, ¶ 22, 278 Wis. 2d 611, 692 N.W.2d 340.

The notice of intent must include the following information, pursuant to Wis. Stat. § 809.30(2)(b):

1. The case name and court caption;

2. An identification of the judgment or order from which the defendant intends to seek postconviction relief, including the date on which it was granted or entered;

3. The name and address of the defendant and the defendant's trial attorney; if the defendant is incarcerated, the notice should include the name and address of the institution of incarceration;

4. Whether the defendant's trial attorney was appointed by the SPD, and if so, whether the defendant's financial circumstances have materially improved since the date the defendant's financial eligibility was determined;

5. Whether the defendant requests the SPD to appoint an attorney for purposes of postconviction relief; and

6. Whether a defendant who does not request the SPD to appoint an attorney will proceed without an attorney, or will be represented by a retained attorney; if the defendant has retained an attorney, that attorney's name and address must be included.

For a discussion of SPD eligibility determinations, see Forms 10.25A–.25C, *infra*, and accompanying Commentary and Instructions.

The notice of intent must be electronically filed in the circuit court. Wis. Stat. § 809.30(2)(b).

Under the procedures outlined by the statute, notice will automatically be sent to the SPD if the defendant requests representation by that office. Form 9.47A, *infra*, includes such a request. Unless the trial attorney knows that the client is not going to qualify for SPD representation, the trial attorney should include such a request. If the defendant does not so request, the time limits for beginning the appeal process begin running immediately. *See* Wis. Stat. § 809.30(2)(e)–(f) (time limits for requesting transcripts and other circuit court records).

It is also advisable, though not required, to send a copy of the notice of intent to the SPD with an SPD Trial Attorney Questionnaire, *infra* Form 10.27E, or a cover letter containing the additional information listed in Form 9.47B, *infra*. Providing the SPD Appellate Division with the firm's file number and, when appropriate, the SPD number and information on potential or actual conflicts of interest, will speed up the appointment process or prevent a needless and time-consuming motion to withdraw at a later date. Background information on plea bargains and the trial will assist the postconviction attorney in evaluating the case. The SPD also likes to know what transcripts have already been prepared, because this information will save time and expense later on. Finally, the trial attorney's evaluation of the potential grounds for appeal, although not binding, is always an invaluable aid to the appellate attorney. This information can be emailed to madisonappintake@opd.wi.gov.

The trial attorney should, when appropriate and when requested by the client, file with the circuit court a motion for release pending appeal. *See infra* Form 9.51A.

Distribution

Form 9.47A
Original: E-file
Copy: District attorney; State Public Defender Appellate Division; client; client file

Form 9.47B
Original: State Public Defender Appellate Division
Copy: Client; client file

Notes

Form 9.47A Notice of Intent to Pursue Postconviction Relief (CRM-0141)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S NOTICE OF INTENT TO PURSUE POSTCONVICTION RELIEF

The defendant gives notice of *(his/her)* intent to seek postconviction relief from the judgment and order entered in this case on *(date)*, in which the defendant was adjudged guilty of *(name crime(s))*, contrary to section*(s)* *(list statute section number(s), including appropriate subsection number(s))* of the Wisconsin Statutes.

(Choose appropriate alternative)

The defendant's trial attorney was appointed by the State Public Defender, and the defendant's financial circumstances have not materially improved since the date of that appointment and the initial determination of indigency.

The defendant requests that the State Public Defender appoint an attorney for purposes of postconviction relief.

(Or)

The defendant will be represented by a retained attorney, *(provide attorney's name and address)*, and does not request that the State Public Defender appoint an attorney.

(Or)

The defendant will represent *(himself/herself)* and does not request that the State Public Defender appoint an attorney.

(Continue)

The following information is provided pursuant to Wis. Stat. § 809.30:

1.	Trial Attorney's Name:	*(2.01) (Attorney Handling Case)*
2.	Trial Attorney's Address:	*(2.03) (Firm/Office Name)* *(2.04) (Firm/Office Address)* *(2.05) (Firm/Office Telephone No.)* *(2.07) (Attorney's Email Address)*
3.	Defendant's Address:	*(3.01) (Client's Name)* *(3.02) (Client's Address)* *(3.03) (Client's Telephone No.)* *(3.06) (Client's Email Address)* *(If the defendant is incarcerated, do not use home address; use the name and address of the institution where the defendant is located)*

Dated: ______________________________

/s/
(Signature of Defendant or Attorney)
(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)
State Bar No. *(2.02)*

Form 9.47B Sample Letter to State Public Defender Appellate Division (CRM-0142)

State Public Defender
Appellate Intake
P.O. Box 7862
Madison, WI 53707-7862

Re: *(3.01) (Client's Name)*
Request for Appellate Attorney

Sir/Madam:

I have represented a client in the circuit court whom I believe to be indigent. My client and I have thoroughly discussed the issue of appeal, and *(he/she)* has decided to appeal. I have filed the notice of intent to pursue postconviction relief, a copy of which is enclosed with this letter. The following additional information will assist you in your efforts:

1.	County	*(1.01) (Name of County)*
2.	Case Numbers:	Our File No: *(2.06) (Firm/Office File No.)* SPD File No: *(5.01) (SPD File No.)*
3.	Conflicts:	*(List the names of any accomplices or co-defendants and the names of their attorneys, if known. Also include information on conflicts with named or unnamed parties, such as witnesses or informants.)*
4.	Transcripts:	*(Indicate whether trial attorney has any transcripts that can be made available to appellate attorney. Include the date and nature of the proceeding and the reporter's name.)*

The conviction in this case was the result of a (plea/court trial/jury trial). (If the conviction was the result of a trial, state the length of the trial. If the conviction was the result of a plea agreement, indicate the terms of the agreement.)

(Choose appropriate alternative)

In my opinion there are arguably meritorious grounds for appeal. The issues that I believe may merit your consideration are as follows:

(State issues)

(Or)

In my opinion, there are no meritorious grounds for appeal.

(Continue)

Thank you very much for your attention to this matter. I would appreciate being notified of the name, address, and telephone number of the appointed appellate attorney. If I can be of any further assistance, please feel free to contact me.

Sincerely,

(2.03) (Firm/Office Name)

/s/
(2.01) (Attorney Handling Case)

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Enclosure

IX. Motion for a New Trial [§ 9.48]

Commentary and Instructions for Form 9.48A

Form 9.48A	Motion for a New Trial (CRM-0143)

Form 9.48A, *infra*, is a motion for a new trial directed to the circuit court. *See* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.10. The trial attorney should keep in mind that such motions should not be filed unless they can be decided before the entry of judgment or the expiration of the 20-day time limit under Wis. Stat. § 809.30(2)(b). Otherwise, the time limits for appeal may be inadvertently overlooked. This risk is increased when the trial attorney will not be handling the appeal, either because a new attorney will be retained or because the SPD will be asked to provide an appointed attorney if the client is financially eligible.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 9.48A Motion for a New Trial (CRM-0143)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order setting aside the finding of guilt against the defendant and for an order granting a new trial. The defendant brings this motion pursuant to Wis. Stat. §§ 805.15 and 974.02 and *State v. Monje*, 109 Wis. 2d 138, 325 N.W.2d 695 (1982).

AS GROUNDS, defendant asserts the following:

(State reasons why a new trial should be granted,
citing appropriate authorities.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

X. Motion to Withdraw Guilty or No-Contest Plea [§ 9.49]

Commentary and Instructions for Form 9.49A

Form 9.49A Motion to Withdraw Guilty or No-Contest Plea (CRM-0144)

Form 9.49A, *infra*, is a motion to withdraw a guilty or no-contest plea. *See* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.11. This motion is directed to the circuit court. Although a motion to withdraw a plea may be filed either before or after sentencing, the trial attorney is wise not to file such a motion unless it can be decided before sentencing. Otherwise, the time limits for appeal may be inadvertently overlooked. This risk is increased when the trial attorney will not be handling the appeal, either because a new attorney will be retained or because the SPD will be asked to provide an appointed attorney if the client is financially eligible. The appellate attorney may also file a motion to withdraw a guilty or no-contest plea, as part of postconviction proceedings under Wis. Stat. § 809.30. *See supra* §§ 9.2–.7.

Case law has stated that the circuit court should freely allow withdrawal before sentencing for "any fair and just reason," unless the prosecution will be "substantially prejudiced." *See, e.g.*, *State v. Jenkins*, 2007 WI 96, ¶ 28, 303 Wis. 2d 157, 736 N.W.2d 24; *State v. Bollig*, 2000 WI 6, ¶ 28, 232 Wis. 2d 561, 605 N.W.2d 199. Nonetheless, the defendant faces significant obstacles in seeking to withdraw his or her plea. *See Jenkins*, 2007 WI 96, ¶¶ 43–44, 303 Wis. 2d 157. At the circuit court level, the defendant must set forth a "fair and just reason" that the court finds credible and must rebut any evidence of substantial prejudice to the prosecution. *Id.* ¶ 43. On appeal, the defendant must overcome a deferential standard of review and (absent a defective procedure in the circuit court) the transcript of an extensive plea colloquy designed to ensure a valid plea. *Id.* ¶ 44.

A motion to withdraw a plea *after* sentencing is generally filed by postconviction counsel rather than trial counsel. A defendant seeking such relief faces a higher burden than that for pre-sentence withdrawal: he or she must show a "manifest injustice." *See supra* § 9.11.

The attorney should advise the client of all the potential consequences of withdrawing a plea. For example, it is possible for a defendant to receive a greater sentence upon reconviction. *See, e.g.*, *State v. Naydihor*, 2004 WI 43, ¶ 8, 270 Wis. 2d 585, 678 N.W.2d 220; *State v. Church*, 2003 WI 74, ¶¶ 48–55, 262 Wis. 2d 678, 665 N.W.2d 141; *State v. Helm*, 2002 WI App 154, ¶ 2, 256 Wis. 2d 285, 647 N.W.2d 405. The defendant will almost certainly lose the benefit of any favorable recommendations or charging concessions previously promised by the district attorney.

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 9.49A Motion to Withdraw Guilty or No-Contest Plea (CRM-0144)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO WITHDRAW *(GUILTY/NO-CONTEST)* PLEA

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order authorizing the defendant to withdraw *(his/her)* plea of *(guilty/no contest)* entered on *(date)*. The defendant brings this motion pursuant to Wis. Stat. § 971.08 and *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); and *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

AS GROUNDS, defendant asserts the following:

(State reasons why the defendant should be allowed to withdraw his or her plea, citing appropriate authorities.)

Dated: ________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]__________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)

(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XI. Motion to Modify Sentence: Legal Error or New Factor [§ 9.50]

Commentary and Instructions for Form 9.50A

Form 9.50A Motion to Modify Sentence (CRM-0145)

Form 9.50A, *infra*, is a motion seeking modification of the sentence because of a legal error or a new factor. This motion is directed to the circuit court. *See generally* Quick Reference Guide to Postconviction Motions and Writs, *supra* § 9.13 (motions to modify sentence).

The defense must always raise a motion to modify sentence in the circuit court before filing an appeal challenging the sentence. *State v. Walker*, 2006 WI 82, ¶ 30, 292 Wis. 2d 326, 716 N.W.2d 498. The trial judge must be given an opportunity to correct any errors and to reconsider the sentence in light of any new factors. *See* Wis. Stat. § 974.02(2); *Walker*, 2006 WI 82, ¶ 30, 292 Wis. 2d 326; *State v. Meyer*, 150 Wis. 2d 603, 442 N.W.2d 483 (Ct. App. 1989). The motion must specify the new factor(s) relied on; a conclusory statement that a new factor exists is insufficient to require the circuit court to hold a hearing. *State v. Washington*, 176 Wis. 2d 205, 500 N.W.2d 331 (Ct. App. 1993). The defendant must prove the existence of a new factor by clear and convincing evidence. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828; *State v. Franklin*, 148 Wis. 2d 1, 434 N.W.2d 609 (1989).

The timing requirements for bringing a motion to modify sentence are as follows:

1. If transcripts have been requested under Wis. Stat. § 809.30(2): Within the general postconviction motion time limit: 60 days after service of the transcripts under Wis. Stat. § 809.30(2)(h), Wis. Stat. § 973.19(1)(b); *see* Quick Reference Guide to Postconviction Relief Under Wis. Stat. § 809.30, *supra* § 9.6;

2. If a new factor is discovered: At any time, *see State v. Trujillo*, 2005 WI 45, ¶ 10, 279 Wis. 2d 712, 694 N.W.2d 933, *abrogated on other grounds by Harbor*, 2011 WI 28, ¶¶ 46–52, 333 Wis. 2d 53; *Cresci v. State*, 89 Wis. 2d 495, 503, 278 N.W.2d 850 (1979); and

3. If pursuing, after sentencing, *only* sentence modification under Wis. Stat. § 973.19(1)(a), and no transcripts have been requested under Wis. Stat. § 809.30(2): Within 90 days after sentencing.

Caution. By filing a motion to modify sentence under Wis. Stat. § 973.19, the defendant *waives the right to file an appeal or postconviction motion under* Wis. Stat. *§ 809.30(2)*. Wis. Stat. § 973.19(5). Thus, if the defendant wants to challenge the conviction or any other aspect of the case in postconviction proceedings, the defense attorney should not proceed under Wis. Stat. § 973.19. See section 9.13, *supra*, for additional hazards of pursuing relief under Wis. Stat. § 973.19. In general, any relief that would be available under Wis. Stat. § 973.19 will be available under the Wis. Stat. § 809.30 procedure; thus, if there is any possibility that the defendant will wish to pursue any other issues, Wis. Stat. § 973.19 should be eschewed.

Distribution

Original: E-file
Copy: Client; client file

Notes

Form 9.50A Motion to Modify Sentence (CRM-0145)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO MODIFY SENTENCE

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order modifying the sentence imposed on the defendant on *(date)*. The defendant brings this motion pursuant to *[select applicable authority, depending on type of motion] (Wis. Stat. § 973.19; Wis. Stat. § 809.30; State v. Harbor, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828; Cresci v. State, 89 Wis. 2d 495, 278 N.W.2d 850 (1979); Klimas v. State, 75 Wis. 2d 244, 249 N.W.2d 285 (1977);) State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; and *State v. Franklin*, 148 Wis. 2d 1, 434 N.W.2d 609 (1989)).

AS GROUNDS, defendant asserts the following:

(State reasons why the sentence should be modified,
whether an erroneous exercise of discretion or new factors, and
cite appropriate authorities in support of the stated reasons.)

Dated: ____________________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]__________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

XII. Motion for Release Pending Appeal [§ 9.51]

Commentary and Instructions for Form 9.51A

Form 9.51A	Motion for Release Pending Appeal (CRM-0146)

Form 9.51A, *infra*, is a motion for release pending appeal, designed for both misdemeanor and felony cases. Wis. Stat. §§ 809.31, 969.01, 969.08, and 969.09 govern release on bond pending appeal; the grant, reduction, and revocation of release; the conditions of release; and the review of a denial of release pending appeal.

It is the trial attorney's responsibility to seek release pending appeal by filing a motion for release pending appeal in the circuit court. *See* Wis. Stat. § 809.31(1). The circuit court has jurisdiction to entertain the motion once the defendant has filed a notice of intent to pursue postconviction relief. *See supra* Form 9.47A.

Release pending appeal is discretionary. Wis. Stat. §§ 969.01(2)(b), (c)–(e), 809.31. Thus, the attorney must be prepared to convince the court, on the basis of the specific circumstances of the case, that the client is a good candidate for release pending appeal. Among the factors that the attorney should address are the likelihood that the client will appear for future proceedings and the client's ability to post cash bail. *See* Wis. Stat. § 969.01(4); *State v. Taylor*, 205 Wis. 2d 664, 672–73, 556 N.W.2d 779 (Ct. App. 1996).

The defendant may obtain review of a denial of release pending appeal by motion to the court of appeals. *See* Wis. Stat. §§ 809.31(5), 809.14. The defendant must attach to the motion copies of the judgment of conviction (or other applicable judgment), the circuit court order regarding release pending appeal, and the transcripts of the release proceedings (or an explanation of why a complete transcribed record is not available). Wis. Stat. § 809.31(5).

Distribution

Original:	E-file
Copy:	Client; client file

Notes

Form 9.51A Motion for Release Pending Appeal (CRM-0146)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION TO MODIFY SENTENCE

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order granting the defendant's release pending the appeal of this case. The defendant brings this motion pursuant to Wis. Stat. §§ 809.31, 969.01, 969.08, and 969.09; and Wis. Const. art. I, §§ 6, 7, 8.

AS GROUNDS, the defendant asserts:

(Specify the facts supporting the relief requested.)

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

XIII. Petition to Modify Court-Imposed Conditions of Extended Supervision Under Wis. Stat. § 302.113(7m) [§ 9.52]

Commentary and Instructions for Forms 9.52A–9.52C

Form 9.52A	Petition to Modify Court-Imposed Conditions of Extended Supervision (CRM-0147)
Form 9.52B	Verification of Date of Release to Extended Supervision (CRM-0148)
Form 9.52C	Order Modifying Court-Imposed Conditions of Extended Supervision (CRM-0149)

Form 9.52A, *infra*, is a petition for modification of court-imposed conditions of extended supervision. This petition is directed towards the sentencing court and may be filed by either the defendant or the DOC.

A petition to modify court-imposed conditions of extended supervision must first be filed in the sentencing court. The court, in its discretion, may provide notice of the petition to the victim(s) of the offense, Wis. Stat. § 302.113(7m)(b), and may hold a hearing on the petition, Wis. Stat. § 302.113(7m)(c). As Form 9.52C, *infra*, reflects, the court may grant a petition, in whole or in part, if it determines that modification of conditions meets the needs of both the DOC and the public, and that modification would be consistent with the objectives of the defendant's sentence. Wis. Stat. § 302.113(7m)(c).

The timing requirements that a *defendant* must follow when bringing a motion to modify court-imposed conditions of supervision are as follows:

1. The defendant may file the petition no earlier than one year before the defendant's scheduled date of release to extended supervision; only one petition may be filed within that time period.

2. The defendant may file the petition no earlier than one year after the defendant's release to extended supervision.

3. If the defendant has filed a petition after being released to extended supervision, the defendant may not file another petition for one year after the previous petition was filed.

   Note. Wis. Stat. § 302.113(7m)(e) does not impose the same limitations on the DOC for filing a petition.

Although not statutorily required under Wis. Stat. § 302.113(7m), Form 9.52B, *infra*, is a mechanism for the DOC to verify the defendant's scheduled date of release to extended supervision when the defendant files a petition to modify court-imposed conditions of extended supervision. The Wisconsin Records Management Committee (RMC), a committee of the Director of State Courts' Office, created Form 9.52B, *infra*, to facilitate the sentencing court's review of petitions to modify court-imposed conditions of extended supervision. The RMC recommends that the DOC complete this form and forward it to the sentencing court.

Distribution

Form 9.52A
Original: E-file

Copy:	Client; client file; DOC; district attorney

Form 9.52B (for DOC to complete)

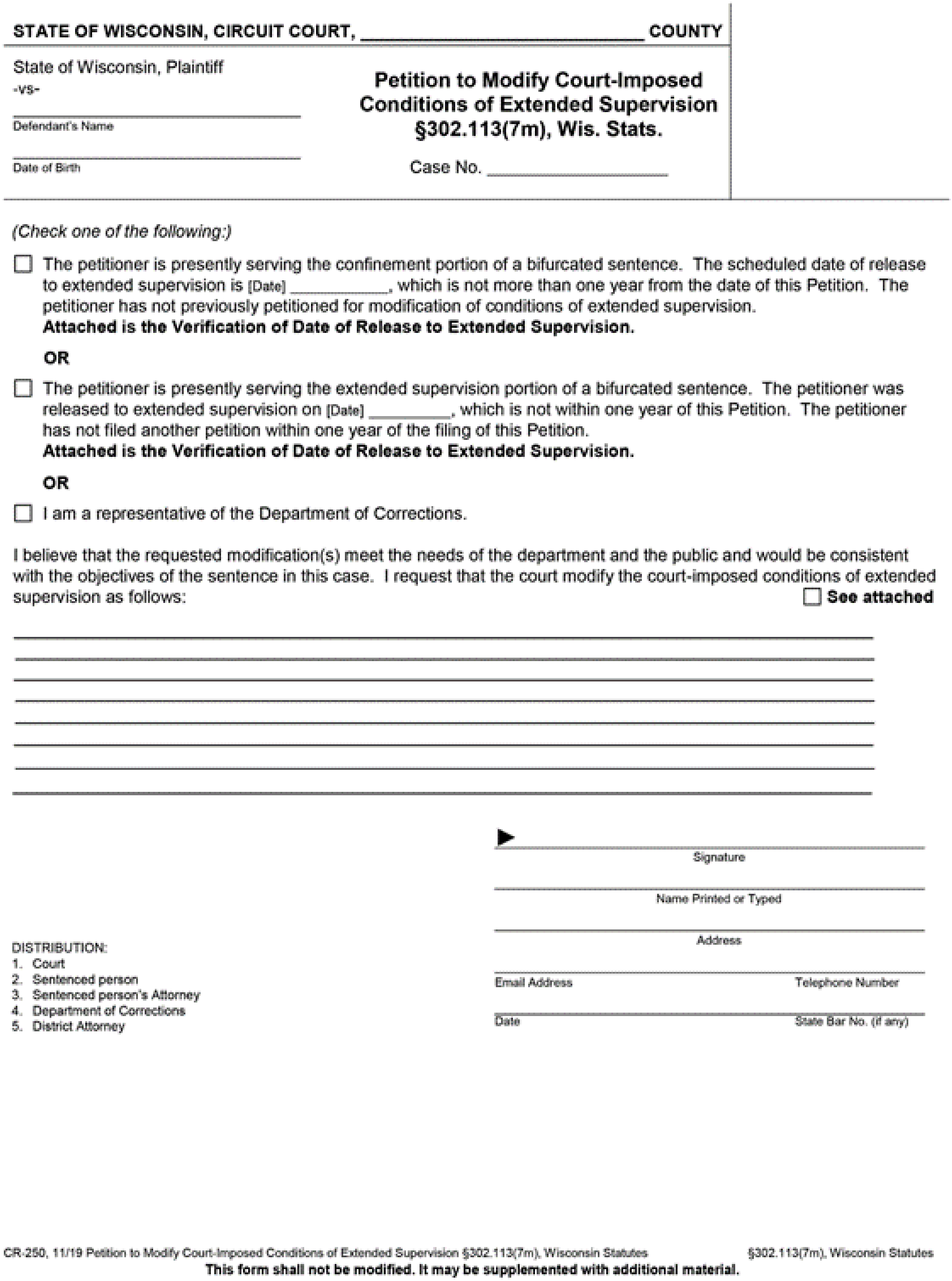
Original:	File with the court
Copy:	None required

Form 9.52C

Original:	Court file
Copy:	Client; client file; district attorney; DOC; victim(s)

Notes

Form 9.52A Petition to Modify Court-Imposed Conditions of Extended Supervision (CRM-0147)



STATE OF WISCONSIN, CIRCUIT COURT, ______________________ COUNTY

State of Wisconsin, Plaintiff
-vs-
____
Defendant's Name
____
Date of Birth

Petition to Modify Court-Imposed Conditions of Extended Supervision §302.113(7m), Wis. Stats.

Case No. ________________

(Check one of the following:)

☐ The petitioner is presently serving the confinement portion of a bifurcated sentence. The scheduled date of release to extended supervision is [Date] __________, which is not more than one year from the date of this Petition. The petitioner has not previously petitioned for modification of conditions of extended supervision. **Attached is the Verification of Date of Release to Extended Supervision.**

OR

☐ The petitioner is presently serving the extended supervision portion of a bifurcated sentence. The petitioner was released to extended supervision on [Date] ________, which is not within one year of this Petition. The petitioner has not filed another petition within one year of the filing of this Petition. **Attached is the Verification of Date of Release to Extended Supervision.**

OR

☐ I am a representative of the Department of Corrections.

I believe that the requested modification(s) meet the needs of the department and the public and would be consistent with the objectives of the sentence in this case. I request that the court modify the court-imposed conditions of extended supervision as follows: ☐ **See attached**

____
____
____
____
____
____
____
____

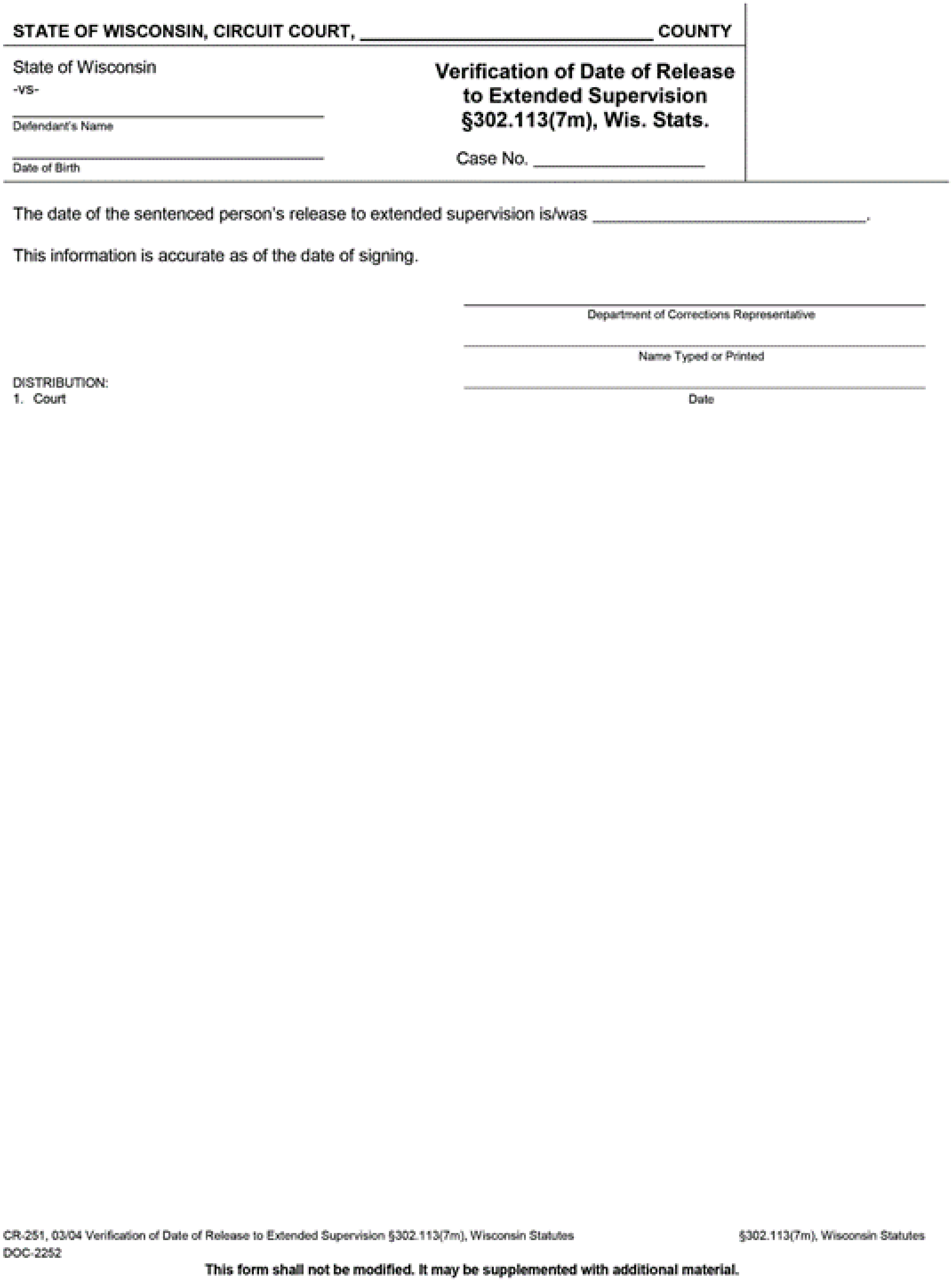
► ______________________
Signature
____
Name Printed or Typed
____
Address
____
Email Address Telephone Number
____
Date State Bar No. (if any)

DISTRIBUTION:
1. Court
2. Sentenced person
3. Sentenced person's Attorney
4. Department of Corrections
5. District Attorney

CR-250, 11/19 Petition to Modify Court-Imposed Conditions of Extended Supervision §302.113(7m), Wisconsin Statutes §302.113(7m), Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Form 9.52B Verification of Date of Release to Extended Supervision (CRM-0148)



STATE OF WISCONSIN, CIRCUIT COURT, ______________________________ COUNTY

State of Wisconsin
-vs-
____
Defendant's Name
____
Date of Birth

Verification of Date of Release to Extended Supervision §302.113(7m), Wis. Stats.

Case No. __________________

The date of the sentenced person's release to extended supervision is/was ____________________________.

This information is accurate as of the date of signing.

____
Department of Corrections Representative

____
Name Typed or Printed

____
Date

DISTRIBUTION:
1. Court

CR-251, 03/04 Verification of Date of Release to Extended Supervision §302.113(7m), Wisconsin Statutes §302.113(7m), Wisconsin Statutes
DOC-2252

This form shall not be modified. It may be supplemented with additional material.

Form 9.52C Order Modifying Court-Imposed Conditions of Extended Supervision (CRM-0149)

Chapter 10

Handling Public Defender Cases

I. Introduction [§ 10.1]

The Office of the State Public Defender (SPD) was created by the Wisconsin Legislature in 1965 as an appellate defense program funded in part by private grants. Defense of indigent defendants at the circuit court level remained the responsibility of the counties, dependent on court-appointed private counsel or local public defender programs. In 1977, the legislature established the SPD as an independent agency under the Public Defender Board and provided for the gradual implementation of an SPD program at the circuit court level. State funding for the SPD program was enacted in 1979. Statutory authority for the SPD system is found in Wis. Stat. ch. 977. Several other statutes refer to the SPD's authority and responsibility in the context of specific types of cases. *See, e.g.*, Wis. Stat. §§ 48.23(4) (right to counsel under Children's Code), 809.30(2)(c)–(e) (appellate procedures when defendant requests SPD representation).[1]

To receive SPD representation, a defendant must meet financial eligibility standards. The standards and procedures for determining eligibility are set forth in Wis. Stat. § 977.07 and Wis. Admin. Code ch. PD 3, and are summarized in the Quick Reference Guide to SPD Policies and Procedures, *infra* §§ 10.3–.7. For those who do not qualify for SPD representation, the courts have the inherent authority to appoint an attorney for someone who cannot retain a lawyer. *See State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991); *infra* Forms 10.25A–.25F and accompanying Commentary and Instructions.

Once a defendant is determined to be eligible, the SPD assigns an attorney—either an SPD staff attorney or a private-bar attorney certified to take SPD cases.

When assigning cases to the private bar, the SPD makes appointments pursuant to two procedures: a rotation system and a contracting system. Rotation appointments are made from a certified list for the case types handled by the agency. *See* Wis. Stat. § 977.08(3)(a)–(e). Contract appointments, made pursuant to Wis. Stat. § 977.08(3)(f), provide for individual attorneys to handle a specified number of cases at a fixed fee per case.

The SPD Assigned Counsel Division (ACD) acts as a liaison with the private bar and coordinates the SPD procedures and policies relating to the private bar. The ACD can be contacted at 17 S. Fairchild Street, Madison, WI 53703, (608) 261-0632, or through the SPD website at https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024).

The SPD holds an annual two-day training conference in the fall for its staff and members of the criminal defense bar. The conference focuses on issues related to public defender representation and is moderately priced for those attorneys taking SPD cases. The SPD also offers on-demand training through its website and moderately priced regional training sessions that are open to private-bar lawyers who handle SPD cases. These training programs focus on the areas in which the SPD provides representation and provide an inexpensive means of fulfilling the SPD continuing legal education (CLE) requirement. *See infra* Forms 10.26F, 10.26G.

The SPD provides information and links to commonly used forms through its website, https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024). The topically indexed case summaries at the SPD's "On Point" blog, https://www.wisconsinappeals.net/ (last visited Aug. 22, 2024), are valuable for research. Information about training opportunities and materials from previous training programs is at *SPD Training Division*, https://www.training.wispd.gov/ (last visited Aug. 22, 2024).

Like any governmental agency, the SPD has established rules and regulations governing its operations. This chapter summarizes the rules relating to the appointment and payment of attorneys in private practice. Attorneys should address specific questions to the ACD.

II. Quick Reference Guide to SPD Policies and Procedures [§ 10.2]

A. Determination of SPD Eligibility [§ 10.3]

1. Right to Counsel [§ 10.4]

As soon as practicable after a person is detained or arrested, the person must be informed of the right to counsel. Wis. Stat. § 967.06(1). Persons who indicate at any time that they are not able to pay in full for a lawyer's services must be permitted to contact the authority for "indigency determinations." Wis. Stat. § 967.06(2)(a). The local SPD office makes eligibility determinations. *See* Wis. Stat. § 977.07(1); *infra* § 10.5.

A person is financially eligible for SPD representation if both the person's available income and assets are less than or equal to the anticipated cost of retaining counsel. *See* Wis. Stat. § 977.02(3).

2. Authority to Determine Eligibility for SPD Appointment [§ 10.5]

The SPD is responsible for making eligibility determinations for all appellate referrals made under Wis. Stat. §§ 809.30(2)(e) and 974.06(3)(b). Wis. Stat. § 977.07(1)(c). Wis. Stat. § 977.07(1)(b) states that the SPD is responsible for determining eligibility for trial representation. If the defendant does not qualify for SPD representation, the county may appoint a lawyer at county expense. This is commonly referred to as a *Dean* appointment. *See State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

3. Method of Determining Eligibility [§ 10.6]

The SPD must determine eligibility as quickly as possible. Wis. Stat. § 977.07(1)(a). Persons facing certain court proceedings are eligible for SPD representation without a financial evaluation. *See* Wis. Stat. § 977.07(1)(a).

To determine whether a person is eligible, the SPD examines the person's income and assets, applying eligibility criteria promulgated by the SPD board. *See* Wis. Stat. § 977.02; *see also infra* Forms 10.25A–.25B (SPD eligibility evaluation forms). Wis. Stat. § 977.02(3) and Wis. Admin. Code ch. PD 3 set forth the standards for determining assets. If the applicant is married, the SPD considers spousal income and assets unless the spouse is a victim of a crime the applicant allegedly committed. Wis. Stat. § 977.02(3)(d).

Although the SPD provides legal representation if it determines that a person meets the SPD financial criteria, the SPD will still seek payment from the person toward the costs of the representation. *See* Wis. Stat. §§ 977.06(1)(d), 977.075. Persons eligible for SPD services without a determination of eligibility are exempt from payment under Wis. Stat. ch. 977. *See* Wis. Stat. § 977.075(1)(g). *But see* Wis. Stat. §§ 48.275, 938.275, 51.605, 55.107 (provisions for court-ordered payment of attorney fees in cases under the respective chapters). The court may also order payment of attorney fees, *see* Wis. Stat. §§ 973.06(1)(e), 973.09(1g), unless the person pays the fixed early-payment amount to the SPD, *see* Wis. Stat. § 977.075(1)(a), (b).

If it determines that the person is eligible, the SPD will refer the case for assignment of an attorney. *See infra* §§ 10.16–.19. Persons ineligible for SPD assistance may move the court to appoint an attorney at county expense. *See infra* Forms 10.25C–.25F and accompanying Commentary and Instructions.

4. Review of SPD Eligibility Determinations [§ 10.7]

A circuit court may review any SPD eligibility determination on its own motion or on the defendant's motion. Wis. Stat. § 977.06(4)(a). The court *must* review any SPD eligibility determination on the district attorney's or SPD's motion. *Id.*

B. Certification of Attorneys [§ 10.8]

1. Introduction [§ 10.9]

The SPD must establish criteria for including attorneys on lists for assignment of various types of cases. *See* Wis. Stat. §§ 977.05(4)(g), 977.08(3)(a), (b); *see also infra* § 10.10. The SPD must also prepare a form that attorneys can use to apply for SPD certification. Wis. Admin. Code § PD 1.03; *see infra* Form 10.26A.

The SPD has developed specialized certification criteria for assigning cases. Wis. Admin. Code § PD 1.04. Some criteria apply to all case categories, *see* Wis. Admin. Code § PD 1.035, and others differ according to the case type, *see* Wis. Admin. Code § PD 1.04. *See infra* § 10.11.

When an attorney first applies for SPD certification, the SPD provisionally certifies the attorney if the attorney meets the certification criteria. *See* Wis. Admin. Code § PD 1.037(1). The SPD reviews the attorney's performance after one year of provisional certification. Wis. Admin. Code § PD 1.037(2)(a). The SPD may then grant certification status, continue the provisional status, or deny certification. *Id.*

2. Certification Criteria [§ 10.10]

a. Certification for Circuit Court Representation [§ 10.11]

Certification for trial-level representation is governed by Wis. Admin. Code §§ PD 1.02–.04. Applications for certification are available on the ACD website, Wis. SPD, *Assigned Counsel Division (ACD)*, Certification, https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024), or from the SPD ACD, P.O. Box 7923, Madison WI 53707-7923.

In general, certification requirements are stricter for the more serious types of cases. For example, certification for misdemeanor cases requires a Wisconsin law license and compliance with the SPD-established CLE requirements. Wis. Admin. Code §§ PD 1.035, PD 1.04(1). Certification for felony cases, however, requires experience in criminal practice, Wis. Admin. Code § PD 1.04(3), while certification for the most serious felony cases requires more extensive experience, *see* Wis. Admin. Code § PD 1.04(3)(c), (d).

Specialized CLE credits are required for certification in certain types of cases. *See* Wis. Admin. Code § PD 1.04; *see also infra* Forms 10.26B–.26D (discussing certification requirements for felonies and other specialized case types).

b. Certification for Appellate Cases [§ 10.12]

Wis. Admin. Code § PD 1.04(13) governs certification for appellate cases. Appellate certification includes two separate levels of certification for criminal cases and four areas of specialty certification, with stricter requirements applicable to the most serious and complex types of cases. *See id.* Applications for appellate certification can be obtained on the SPD website, at https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024), or from the SPD Appellate Office, 17 S. Fairchild Street, Third Floor, Madison, WI 53703, (608) 266-8563. *See also infra* Form 10.26E (discussing appellate certification requirements in greater detail). Applications for appellate certification for cases originating in Milwaukee County should be submitted to the Milwaukee Appellate Office at 735 N. Water St., Suite 912, Milwaukee, WI 53202. All other applications should be submitted to the Madison Appellate Office, 17 S. Fairchild St., 3d Floor, Madison, WI 53703.

Attorneys taking appellate appointments are expected to be familiar with the Wisconsin State Public Defender—Appellate Division's *Appellate Practice and Procedure for SPD-Appointed Counsel* (5th ed. Oct. 2021), available under the "Resources" subheading at Wis. State Pub. Defenders, *Appellate Division*, https://www.wispd.gov/appellate-division (last visited Aug. 22, 2024).

3. Continuing Legal Education Requirement [§ 10.13]

Any attorney certified to handle SPD cases must complete six hours of CLE each calendar year, in courses approved by the SPD. Wis. Admin. Code § PD 1.035(4). The CLE credits must be completed in areas substantially related to the work for which the attorney is, or may be, certified. Attorneys report their qualifying CLE credits to the SPD online. CLE reporting must be done by January 1 of each year. Failure to meet this requirement will result in loss of certification.

The SPD offers training to the private bar to satisfy the CLE requirements. Wis. Admin. Code § PD 1.035(4)(c). Information about training programs, including many that are available online on demand, is available on the SPD website at https://www.training.wispd.gov/ (last visited Aug. 22, 2024).

4. Counties in Which Private Counsel May Be Certified [§ 10.14]

Attorneys are generally certified in those counties in which they reside or maintain their principal offices. Wis. Admin. Code § PD 1.035(3)(b). In counties in which there are fewer than 10 attorneys on the certification list, attorneys from adjoining counties may also be certified. *Id.* If no attorney on the certified list is available to accept appointments, the SPD may appoint cases to attorneys certified in other counties. *See* Wis. Admin. Code § PD 1.035(3)(c).

5. Certification Decisions [§ 10.15]

Attorneys have the right to appeal SPD decisions regarding attorney certification status to the SPD Board. *See* Wis. Admin. Code §§ PD 1.03(2)(b), PD 1.05; *see also* Wis. Stat. § 977.08(3)(b). Attorneys can obtain review of SPD Board decisions by petition to the circuit court under Wis. Stat. ch. 227. *See* Wis. Stat. §§ 227.40, 227.49, 227.52, 227.59; Wis. Admin. Code § PD 1.05(5). Among the adverse decisions subject to review are suspension and decertification from any or all lists for which the attorney was certified. *See* Wis. Admin. Code §§ PD 1.03(3), (4), PD 1.05.

C. Assignment Procedure [§ 10.16]

1. Assignment of Cases [§ 10.17]

The SPD has two methods for assigning cases to the private bar: fixed-fee contracts and rotation. *See* Wis. Stat. § 977.08(3). Fixed-fee contracts are awarded for a given number of cases in a case category. Attorneys interested in applying for a contract should contact the director of the ACD.

Whenever a case is assigned to the private bar pursuant to rotation, the local SPD office contacts the attorney whose name appears at the top of the list appropriate for that type of case. If the attorney cannot accept the case, the next attorney on this list is contacted. The first attorney's name is placed at the bottom of the list, as is the name of the attorney who accepts the case. Wis. Stat. § 977.08(3)(c); Wis. Admin. Code § PD 2.03(8), (9).

The SPD may deviate from the regular appointment system in emergency situations. *See* Wis. Admin. Code § PD 2.02. *Emergency assignment* means assignment of counsel outside normal business hours or when regular assignment will not provide both effective and early representation. Wis. Admin. Code § PD 2.01(1). For example, an attorney might be assigned on an emergency basis for a client required to participate in a lineup on short notice.

An appointment to handle a case on appeal is considered a separate appointment. *See* Wis. Admin. Code § PD 2.11(1). The Appellate Division follows a rotational appointment system similar to that of the Trial Division for cases assigned to private attorneys. Each time an Appellate Division case moves from one court level to the next (i.e., circuit court to court of appeals, court of appeals to state supreme court, state supreme court to federal court), a new appointment of appellate counsel is made.

The trial attorney will not be appointed to the case on appeal. The SPD will appoint a different attorney to pursue postconviction relief. The trial attorney's primary appellate duty is to ensure that the client's appeal rights are protected. *See supra* ch. 9.

2. Client's Right to Request Another Attorney [§ 10.18]

SPD rules allow the client to request that the attorney assigned be discharged and that another attorney be appointed. The client does not, however, have the right to request a specific attorney. *See* Wis. Admin. Code § PD 2.04.

A request for a different attorney will be granted under the following conditions:

1. The request is the only such request made by the client in the case, Wis. Admin. Code § PD 2.04(1)(a), or the court grants the defense attorney's motion to withdraw for good cause, Wis. Admin. Code § PD 2.04(2).

2. The change in attorney will not delay the disposition of the case or otherwise be contrary to the interests of justice, Wis. Admin. Code § PD 2.04(1)(b).

3. The court allows the attorney originally assigned to the case to withdraw, Wis. Admin. Code § PD 2.04(2).

> ***Practice Tip.*** If the assigned attorney learns of the client's request to change attorneys, the attorney should ask the local SPD office if it is the client's first such request. Generally, the more attorneys who already have been appointed, the more difficult it is to find a new attorney. Also, the chances of the client being satisfied with a new attorney may decline with each successive request to change attorneys.

The client's right to request a change of attorney is distinct from the attorney's long-recognized right to request the court's permission to withdraw from a case for reasons such as conflict of interest or ill health. The attorney should make a motion to withdraw to the court having jurisdiction over the case. Wis. Stat. §§ 807.02, 977.08(1); SCR 20:1.10; SCR 20:1.16. If the attorney is allowed to withdraw, the SPD ordinarily will appoint another attorney.

> ***Practice Tip.*** When drafting a motion to withdraw, the assigned attorney must comply with SCR 20:1.6 (Confidentiality) and disclose only what the "lawyer reasonably believes necessary."

3. Assignment of Previously Retained Counsel [§ 10.19]

Wis. Admin. Code § PD 2.07 allows the SPD to assign an attorney, originally retained by the client, to continue representing the client in limited circumstances. A retained attorney who wants to be appointed by the SPD should consult the detailed provisions of this rule to see if the attorney qualifies for appointment.

D. Investigators and Experts [§ 10.20]

Wis. Admin. Code § PD 2.12 provides that the SPD may, upon request, authorize private attorneys assigned to SPD cases to retain the services of investigators and experts. If the SPD approves the request, the agency will reimburse the costs of the services.

The private attorney must obtain prior SPD approval to hire an expert or an investigator. All requests for experts, investigators, or other expenses must be submitted using the online billing system. In an emergency, the SPD may approve an expert or investigator by telephone, but the attorney must then follow up with the written online form.

As a general rule, it is easier to obtain approval to hire an investigator than an expert. The SPD will evaluate requests based on the nature of the investigation requested. Investigators will not be approved to perform duties that are properly the attorney's, such as interviewing the client, or duties that can be more economically carried out by other individuals, such as service of subpoenas, *see* Wis. Stat. § 885.10.

> ***Practice Tip.*** The attorney should advise the expert or investigator that the case is an SPD appointment and that the attorney is not advancing any fees. The expert or investigator might not be paid until the case is completed. Finally, the expert or investigator should agree to accept the amount of compensation approved by the SPD.

All requests for investigators and experts by assigned private attorneys are directed to and reviewed by the SPD ACD in Madison. The SPD makes payments for experts or investigators to the attorney; it is the attorney's responsibility to pay the expert or investigator.

> ***Practice Tip.*** According to SCR 20:1.15(e)(1), upon receiving funds in which a third party has an interest, "the lawyer shall promptly deliver to the … 3rd party any funds … the … 3rd party is entitled to receive." Failure to comply with this rule could result in an attorney being removed from SPD certification lists. *See* Wis. Admin. Code § PD 1.03(5)(e).

E. Vouchers and Payment [§ 10.21]

1. Statutory Compensation Rate [§ 10.22]

The rate of compensation for private attorneys on cases assigned by rotation is $100 per hour for time spent in court and out of court (excluding travel) and $50 per hour for time spent in travel outside the county in which the attorney's principal office is located. Wis. Stat. § 977.08(4m)(e).

For fixed-fee contracts, the compensation cannot exceed the amount that would be paid if the cases were assigned by rotation (and thus paid on an hourly basis). *See* Wis. Stat. § 977.08(3)(f).

2. Payment Procedures [§ 10.23]

Within six months after the conclusion of the case, the private attorney should submit a bill and a case-closing form to the SPD. *See* Wis. Stat. § 977.08(4) (general process); Wis. Admin. Code § PD 4.02 (SPD need not pay promptly if bill not submitted within six months). Attorneys submit their bills through the SPD's online billing system. The bills must include an itemized listing of the services provided and the expenses incurred, and they must allocate time to three categories (in-court; out-of-court; and out-of-county travel).

Detailed information regarding SPD billing, including online signup, is available online at https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024).

3. Appeal of Reduced Payments [§ 10.24]

Attorneys should review the terms and conditions of case appointments posted on the SPD website: https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024). The SPD has the authority to reject the bill or to approve it in whole or in part. Wis. Stat. § 977.08(4); Wis. Admin. Code §§ PD 4.02, PD 4.06. The SPD may reduce or reject a bill if the amount of time expended on the case appears to be unreasonable, *see* Wis. Admin. Code § PD 4.02, if expenses were not authorized or exceeded the amount authorized, *see* Wis. Stat. § 977.05(4r)(a), or if the bill appears to be fraudulent. "'Reasonable hours' are those required by an experienced, prudent and competent practitioner to provide effective assistance. When auditing a bill for 'reasonableness', the SPD will consider a number of factors, including:

- experience of the attorney
- common charges
- whether the attorney withdrew
- extent and novelty of motion practice
- seriousness of the charges and case type
- complexity of the fact pattern and legal issues
- whether the case resolved with a plea or trial."

Assigned Counsel Division (ACD) Manual 36 (Oct. 5, 2023), https://a085287e-be0f-47c1-be03-0b844567f686.usrfiles.com/ugd/a08528_c0483c56114041849962ee85d838dba1.pdf.

The attorney has the right to appeal the reduction of any bill. Wis. Stat. § 977.08(4); Wis. Admin. Code § PD 4.03. The procedure for appeal of a reduced bill is provided in Wis. Admin. Code § PD 4.03. During the pendency of the appeal, the attorney may cash the check for the reduced amount without compromising the right to appeal. Wis. Admin. Code § PD 4.03(3).

III. Eligibility Determinations [§ 10.25]

Commentary and Instructions for Forms 10.25A–10.25F

Form 10.25A	SPD Ability to Pay Form (CRM-0150)
Form 10.25B	SPD Eligibility Evaluation Form (Appellate Division) (CRM-0151)
Form 10.25C	Petition for Appointment of an Attorney: Form Summary (CRM-0152)
Form 10.25D	Petition for Appointment of an Attorney, Affidavit of Indigency (CRM-0153)
Form 10.25E	Order on Petition for Appointment of an Attorney: Form Summary (CRM-0154)
Form 10.25F	Order on Petition for Appointment of an Attorney, Affidavit of Indigency (CRM-0155)

Persons detained or arrested must be informed of their right to counsel as soon as practicable after their detention or arrest. Wis. Stat. § 967.06(1). Persons who indicate, at any time, that they are not able to hire an attorney must be permitted to contact the SPD. *See id.*

Eligibility determinations are governed by Wis. Stat. § 977.02 and Wis. Admin. Code ch. PD 3. For a brief overview of eligibility determinations under SPD guidelines, see sections 10.3–.7, *supra*.

A defendant seeking an eligibility determination from the SPD must provide the information necessary to complete an eligibility evaluation form. Forms 10.25A and 10.25B, *infra*, are the two such forms used by the SPD; the forms are tailored to different case types (trial and appellate). The forms are complex, and SPD staff are trained to assist defendants in completing them. Because the form for an Appellate Division appointment, *infra* Form 10.25B, is usually completed by the applicant without the help of an SPD staff person, its instructions contain greater detail.

If the SPD determines that the defendant is eligible for appointment of counsel, the SPD will appoint either an SPD staff attorney or a private attorney from the applicable certification list.

If the defendant does not meet SPD eligibility standards, the defendant may move the court to appoint an attorney at county expense by filing a petition for appointment of counsel and an affidavit of indigency (*infra* Forms 10.25D, 10.25F). The instructions for completing the forms may be found in Forms 10.25C and 10.25E, *infra*. The affidavit must be sworn to and signed in front of a notary public.

The legal basis for a motion for appointment of counsel at county expense is the constitutional right of an indigent defendant to be assisted by an appointed attorney. *See State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). The courts have the inherent power to appoint counsel for the representation of indigent defendants. *State ex rel. Fitas v. Milwaukee Cnty.*, 65 Wis. 2d 130, 134, 221 N.W.2d 902 (1974). This power predates the SPD system but is not superseded by it, according to the *Dean* court:

> The creation of the public defender's office is not the exclusive means for assuring counsel to indigents and did not negate the inherent power of the court to appoint when the public defender declines to act
> ….
>
> [Even if] the legislature's indigency criteria are not met, the court can still declare the defendant indigent for purposes of appointing [private] counsel to protect the defendant's constitutional right to counsel.

Dean, 163 Wis. 2d at 513; *see State ex rel. Chiarkas v. Skow*, 160 Wis. 2d 123, 137–38, 465 N.W.2d 625 (1991); *Door Cnty. v. Hayes-Brook*, 153 Wis. 2d 1, 449 N.W.2d 601 (1990); *State v. Lehman*, 137 Wis. 2d

65, 76–77, 403 N.W.2d 438 (1987). The defendant has the burden of proving that he or she is unable to retain private counsel by presenting evidence to the circuit court of his or her assets, income, liabilities, and attempts to retain counsel. *Dean*, 163 Wis. 2d at 513–14. Forms 10.25C and 10.25E, *infra*, are designed to assist the defendant in preparing this evidence for the court.

Distribution

Forms 10.25A–10.25B

Original:	SPD files
Copy:	Defendant

Form 10.25C

Original:	Defendant
Copy:	None

Form 10.25D

Original:	E-file
Copy:	Defendant

Form 10.25E

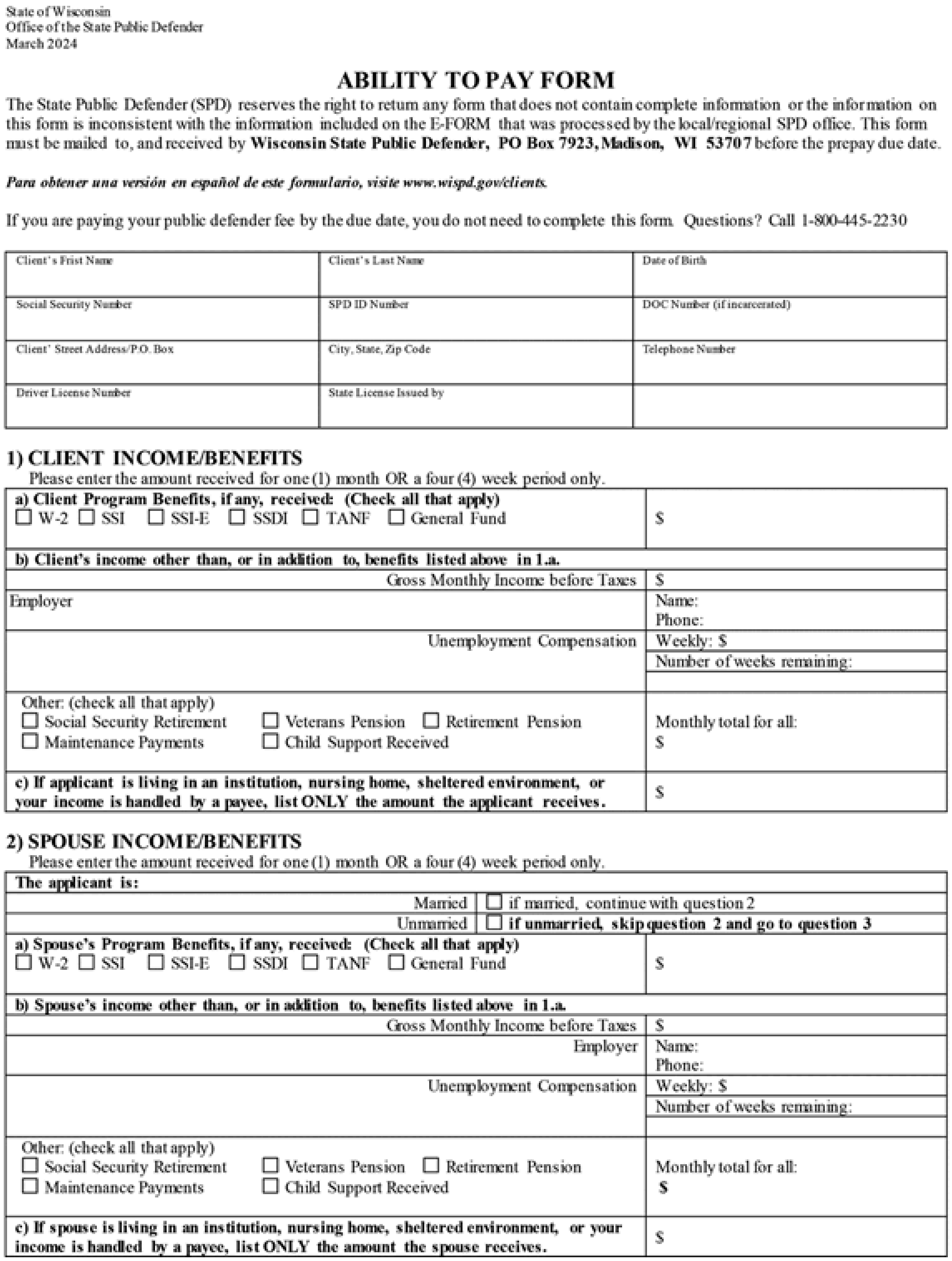
Original:	Defendant
Copy:	None

Form 10.25F

Original:	E-file
Copy:	Defendant

Notes

Form 10.25A SPD Ability to Pay Form (CRM-0150)



State of Wisconsin
Office of the State Public Defender
March 2024

ABILITY TO PAY FORM

The State Public Defender (SPD) reserves the right to return any form that does not contain complete information or the information on this form is inconsistent with the information included on the E-FORM that was processed by the local/regional SPD office. This form must be mailed to, and received by **Wisconsin State Public Defender, PO Box 7923, Madison, WI 53707** before the prepay due date.

Para obtener una versión en español de este formulario, visite www.wispd.gov/clients.

If you are paying your public defender fee by the due date, you do not need to complete this form. Questions? Call 1-800-445-2230

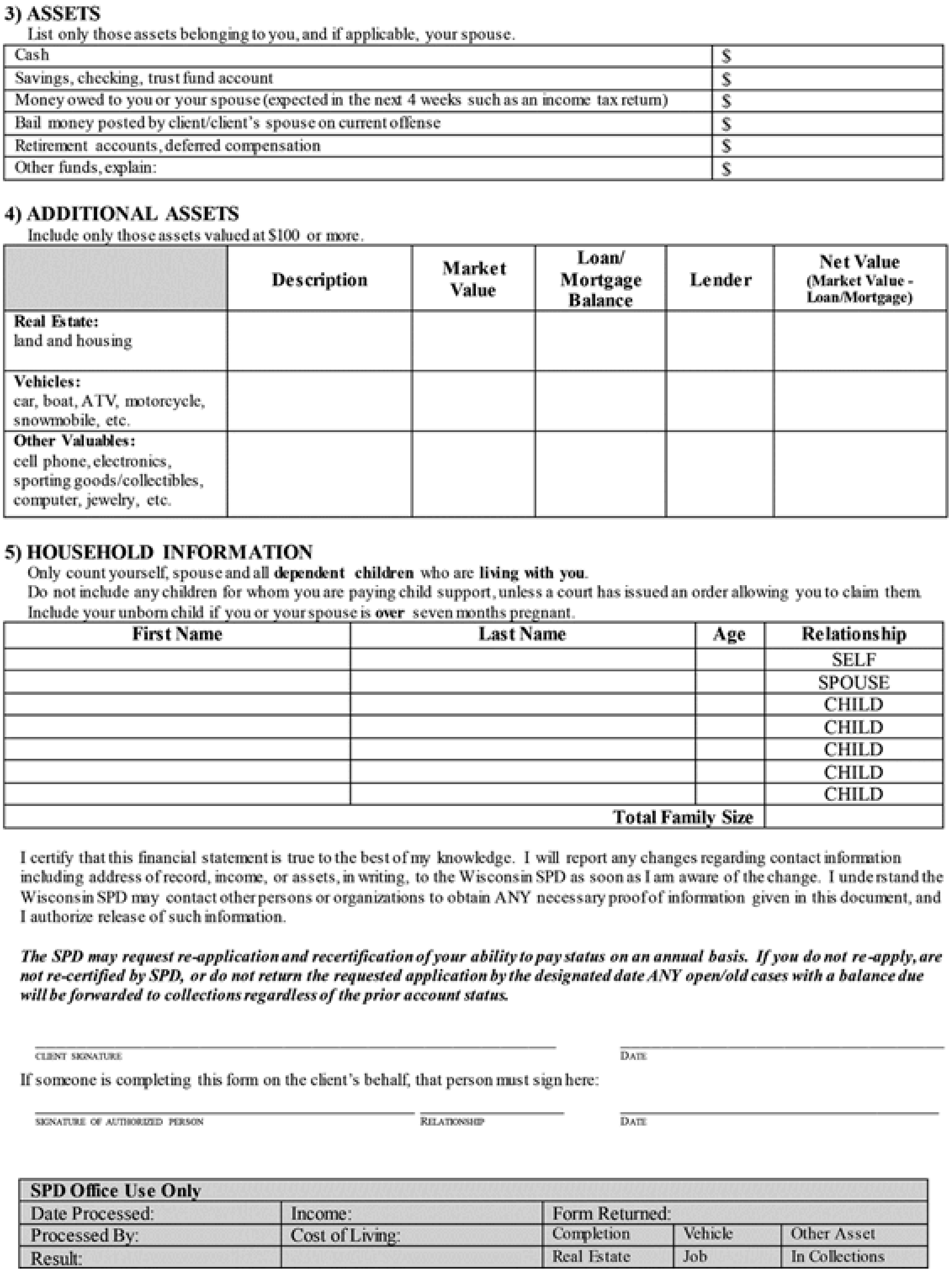
Client's Frist Name	Client's Last Name	Date of Birth
Social Security Number	SPD ID Number	DOC Number (if incarcerated)
Client' Street Address/P.O. Box	City, State, Zip Code	Telephone Number
Driver License Number	State License Issued by	

1) CLIENT INCOME/BENEFITS
Please enter the amount received for one (1) month OR a four (4) week period only.

a) Client Program Benefits, if any, received: (Check all that apply) ☐ W-2 ☐ SSI ☐ SSI-E ☐ SSDI ☐ TANF ☐ General Fund	$
b) Client's income other than, or in addition to, benefits listed above in 1.a.	
Gross Monthly Income before Taxes	$
Employer	Name: Phone:
Unemployment Compensation	Weekly: $ Number of weeks remaining:
Other: (check all that apply) ☐ Social Security Retirement ☐ Veterans Pension ☐ Retirement Pension ☐ Maintenance Payments ☐ Child Support Received	Monthly total for all: $
c) If applicant is living in an institution, nursing home, sheltered environment, or your income is handled by a payee, list ONLY the amount the applicant receives.	$

2) SPOUSE INCOME/BENEFITS
Please enter the amount received for one (1) month OR a four (4) week period only.

The applicant is:	
Married	☐ if married, continue with question 2
Unmarried	☐ **if unmarried, skip question 2 and go to question 3**
a) Spouse's Program Benefits, if any, received: (Check all that apply) ☐ W-2 ☐ SSI ☐ SSI-E ☐ SSDI ☐ TANF ☐ General Fund	$
b) Spouse's income other than, or in addition to, benefits listed above in 1.a.	
Gross Monthly Income before Taxes	$
Employer	Name: Phone:
Unemployment Compensation	Weekly: $ Number of weeks remaining:
Other: (check all that apply) ☐ Social Security Retirement ☐ Veterans Pension ☐ Retirement Pension ☐ Maintenance Payments ☐ Child Support Received	Monthly total for all: **$**
c) If spouse is living in an institution, nursing home, sheltered environment, or your income is handled by a payee, list ONLY the amount the spouse receives.	$



3) ASSETS

List only those assets belonging to you, and if applicable, your spouse.

Cash	$
Savings, checking, trust fund account	$
Money owed to you or your spouse (expected in the next 4 weeks such as an income tax return)	$
Bail money posted by client/client's spouse on current offense	$
Retirement accounts, deferred compensation	$
Other funds, explain:	$

4) ADDITIONAL ASSETS

Include only those assets valued at $100 or more.

	Description	Market Value	Loan/ Mortgage Balance	Lender	Net Value (Market Value - Loan/Mortgage)
Real Estate: land and housing					
Vehicles: car, boat, ATV, motorcycle, snowmobile, etc.					
Other Valuables: cell phone, electronics, sporting goods/collectibles, computer, jewelry, etc.					

5) HOUSEHOLD INFORMATION

Only count yourself, spouse and all **dependent children** who are **living with you**.

Do not include any children for whom you are paying child support, unless a court has issued an order allowing you to claim them.

Include your unborn child if you or your spouse is **over** seven months pregnant.

First Name	Last Name	Age	Relationship
			SELF
			SPOUSE
			CHILD
			CHILD
			CHILD
			CHILD
			CHILD
		Total Family Size	

I certify that this financial statement is true to the best of my knowledge. I will report any changes regarding contact information including address of record, income, or assets, in writing, to the Wisconsin SPD as soon as I am aware of the change. I understand the Wisconsin SPD may contact other persons or organizations to obtain ANY necessary proof of information given in this document, and I authorize release of such information.

The SPD may request re-application and recertification of your ability to pay status on an annual basis. If you do not re-apply, are not re-certified by SPD, or do not return the requested application by the designated date ANY open/old cases with a balance due will be forwarded to collections regardless of the prior account status.

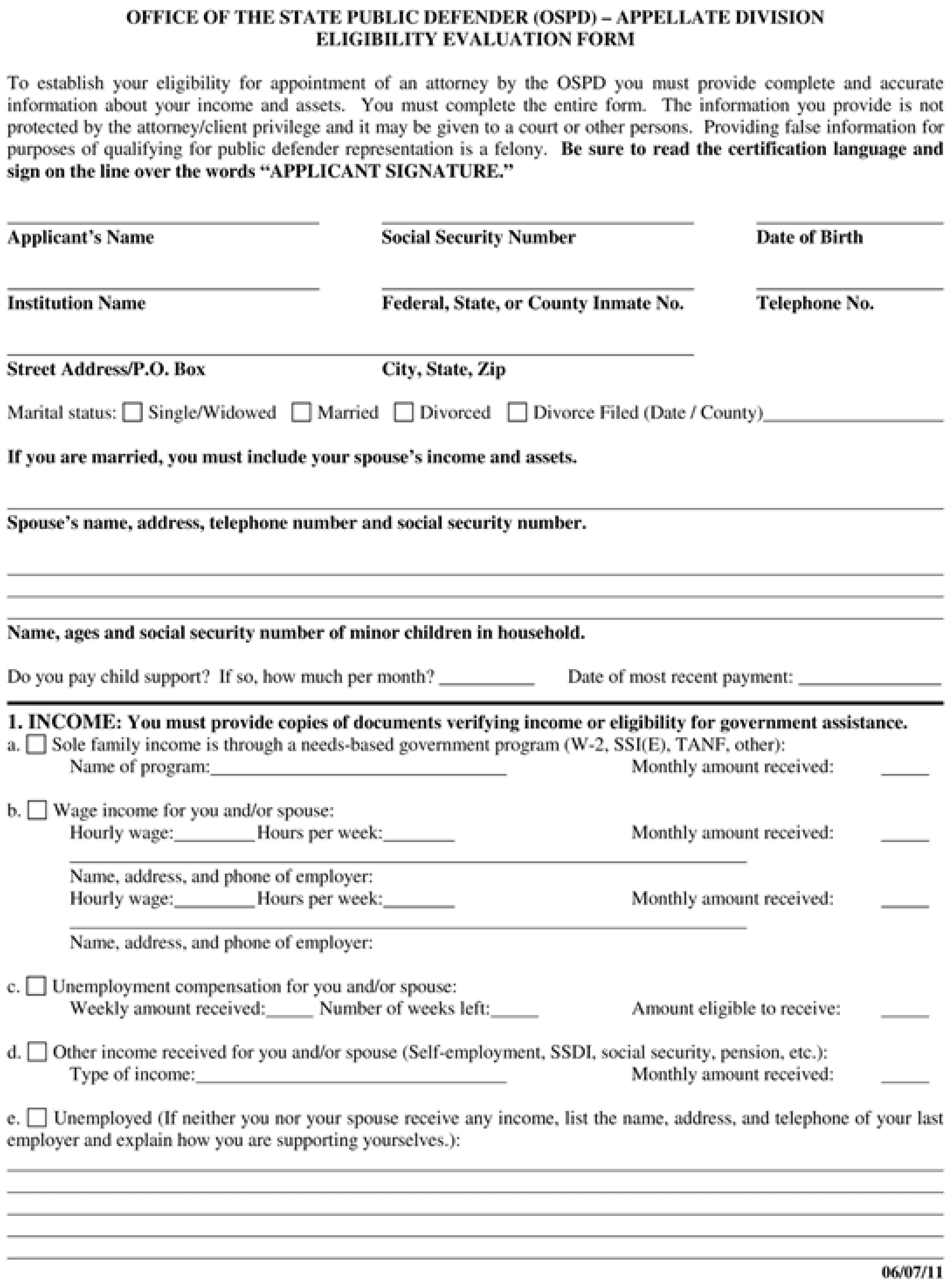
CLIENT SIGNATURE DATE

If someone is completing this form on the client's behalf, that person must sign here:

SIGNATURE OF AUTHORIZED PERSON RELATIONSHIP DATE

SPD Office Use Only				
Date Processed:	Income:	Form Returned:		
Processed By:	Cost of Living:	Completion	Vehicle	Other Asset
Result:		Real Estate	Job	In Collections

Form 10.25B SPD Eligibility Evaluation Form (Appellate Division) (CRM-0151)



OFFICE OF THE STATE PUBLIC DEFENDER (OSPD) – APPELLATE DIVISION
ELIGIBILITY EVALUATION FORM

To establish your eligibility for appointment of an attorney by the OSPD you must provide complete and accurate information about your income and assets. You must complete the entire form. The information you provide is not protected by the attorney/client privilege and it may be given to a court or other persons. Providing false information for purposes of qualifying for public defender representation is a felony. **Be sure to read the certification language and sign on the line over the words "APPLICANT SIGNATURE."**

Applicant's Name	**Social Security Number**	**Date of Birth**
Institution Name	**Federal, State, or County Inmate No.**	**Telephone No.**
Street Address/P.O. Box	**City, State, Zip**	

Marital status: ☐ Single/Widowed ☐ Married ☐ Divorced ☐ Divorce Filed (Date / County)__________________

If you are married, you must include your spouse's income and assets.

Spouse's name, address, telephone number and social security number.

Name, ages and social security number of minor children in household.

Do you pay child support? If so, how much per month? __________ Date of most recent payment: _______________

1. INCOME: You must provide copies of documents verifying income or eligibility for government assistance.

a. ☐ Sole family income is through a needs-based government program (W-2, SSI(E), TANF, other):
Name of program:_______________________________ Monthly amount received: _____

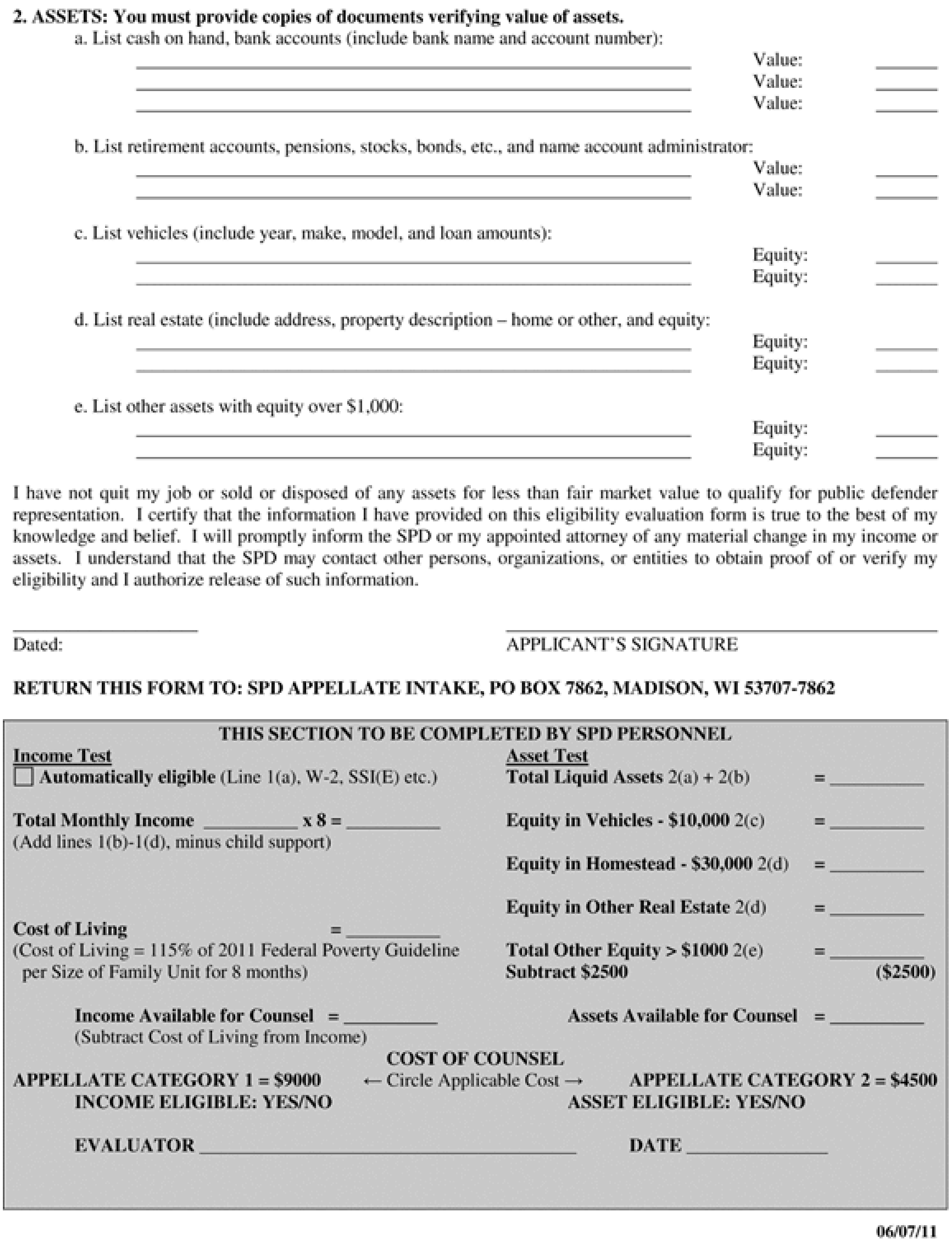
b. ☐ Wage income for you and/or spouse:
Hourly wage:________Hours per week:_______ Monthly amount received: _____
Name, address, and phone of employer:
Hourly wage:________Hours per week:_______ Monthly amount received: _____
Name, address, and phone of employer:

c. ☐ Unemployment compensation for you and/or spouse:
Weekly amount received:_____ Number of weeks left:_____ Amount eligible to receive: _____

d. ☐ Other income received for you and/or spouse (Self-employment, SSDI, social security, pension, etc.):
Type of income:_______________________________ Monthly amount received: _____

e. ☐ Unemployed (If neither you nor your spouse receive any income, list the name, address, and telephone of your last employer and explain how you are supporting yourselves.):

06/07/11



2. ASSETS: You must provide copies of documents verifying value of assets.

a. List cash on hand, bank accounts (include bank name and account number):

______________________________ Value: ______
______________________________ Value: ______
______________________________ Value: ______

b. List retirement accounts, pensions, stocks, bonds, etc., and name account administrator:

______________________________ Value: ______
______________________________ Value: ______

c. List vehicles (include year, make, model, and loan amounts):

______________________________ Equity: ______
______________________________ Equity: ______

d. List real estate (include address, property description – home or other, and equity:

______________________________ Equity: ______
______________________________ Equity: ______

e. List other assets with equity over $1,000:

______________________________ Equity: ______
______________________________ Equity: ______

I have not quit my job or sold or disposed of any assets for less than fair market value to qualify for public defender representation. I certify that the information I have provided on this eligibility evaluation form is true to the best of my knowledge and belief. I will promptly inform the SPD or my appointed attorney of any material change in my income or assets. I understand that the SPD may contact other persons, organizations, or entities to obtain proof of or verify my eligibility and I authorize release of such information.

Dated: ______________ APPLICANT'S SIGNATURE ______________________

RETURN THIS FORM TO: SPD APPELLATE INTAKE, PO BOX 7862, MADISON, WI 53707-7862

THIS SECTION TO BE COMPLETED BY SPD PERSONNEL

Income Test	**Asset Test**
☐ **Automatically eligible** (Line 1(a), W-2, SSI(E) etc.)	**Total Liquid Assets** 2(a) + 2(b) = ______
Total Monthly Income ______ **x 8 =** ______ (Add lines 1(b)-1(d), minus child support)	**Equity in Vehicles - $10,000** 2(c) = ______
	Equity in Homestead - $30,000 2(d) = ______
	Equity in Other Real Estate 2(d) = ______
Cost of Living = ______ (Cost of Living = 115% of 2011 Federal Poverty Guideline per Size of Family Unit for 8 months)	**Total Other Equity > $1000** 2(e) = ______ **Subtract $2500** **($2500)**
Income Available for Counsel = ______ (Subtract Cost of Living from Income)	**Assets Available for Counsel** = ______

COST OF COUNSEL

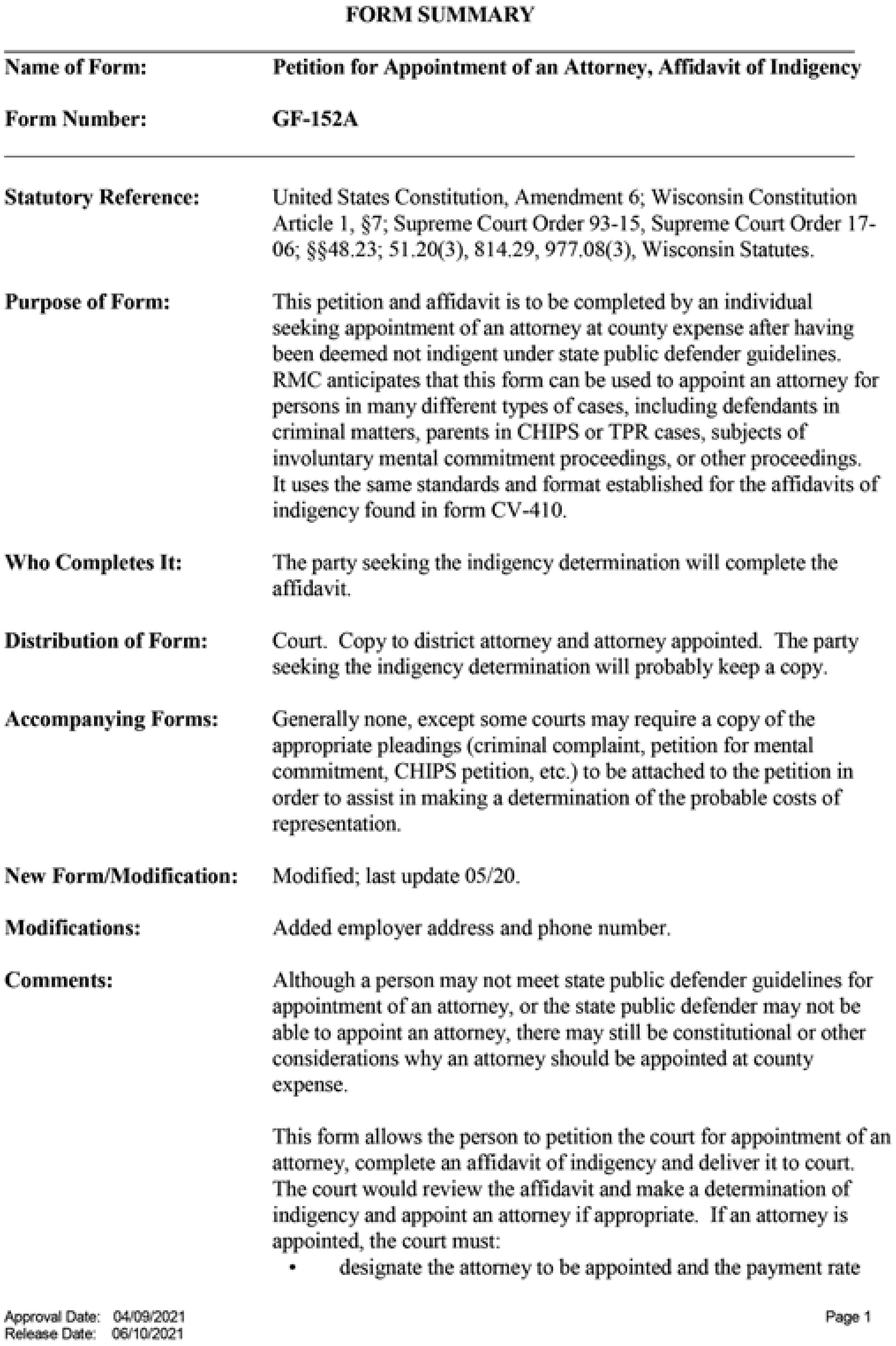
APPELLATE CATEGORY 1 = $9000 ← Circle Applicable Cost → **APPELLATE CATEGORY 2 = $4500**

INCOME ELIGIBLE: YES/NO **ASSET ELIGIBLE: YES/NO**

EVALUATOR ______________________ **DATE** ____________

06/07/11

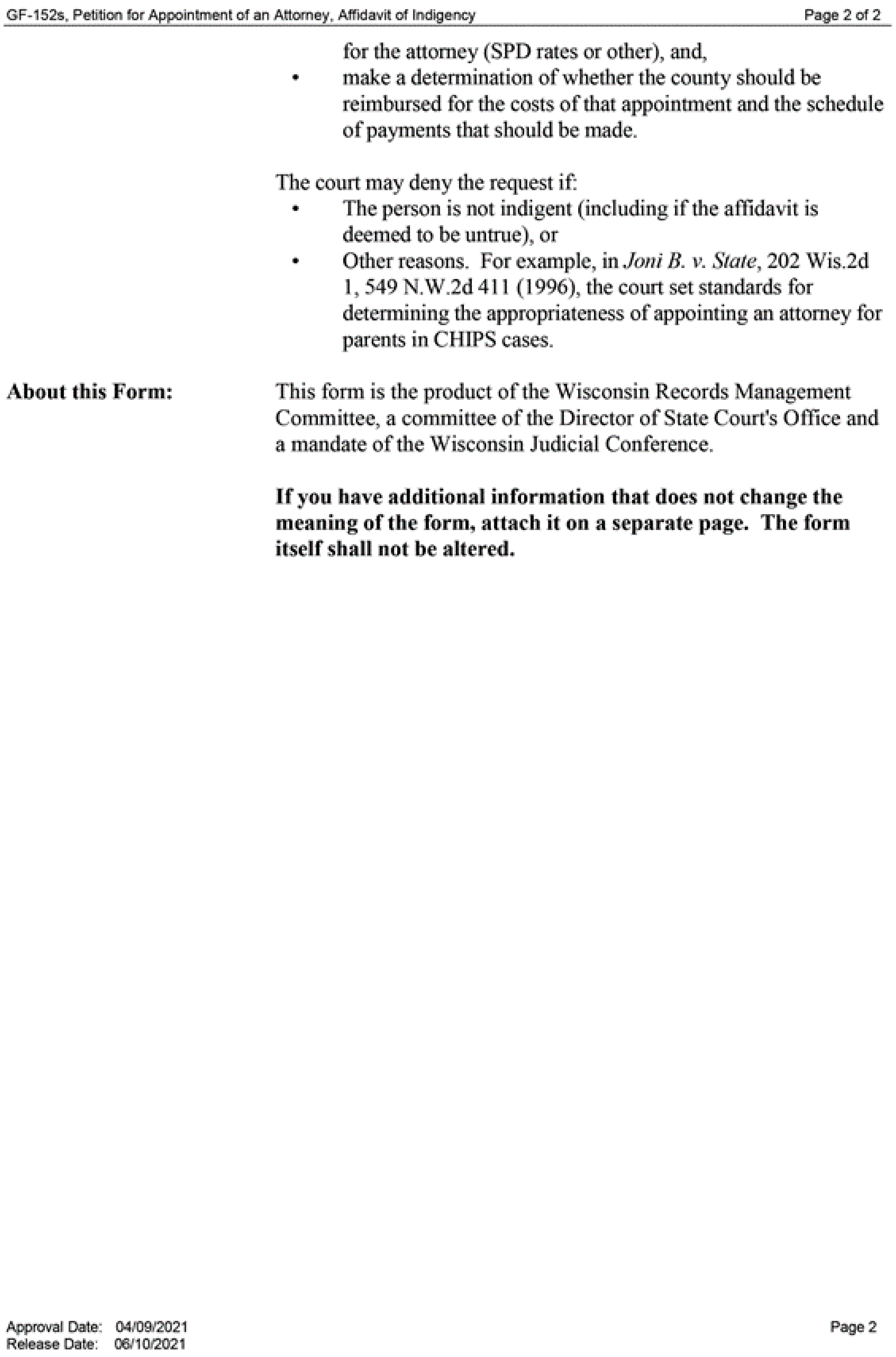
Form 10.25C Petition for Appointment of an Attorney: Form Summary (CRM-0152)



FORM SUMMARY

Name of Form:	**Petition for Appointment of an Attorney, Affidavit of Indigency**
Form Number:	**GF-152A**
Statutory Reference:	United States Constitution, Amendment 6; Wisconsin Constitution Article 1, §7; Supreme Court Order 93-15, Supreme Court Order 17-06; §§48.23; 51.20(3), 814.29, 977.08(3), Wisconsin Statutes.
Purpose of Form:	This petition and affidavit is to be completed by an individual seeking appointment of an attorney at county expense after having been deemed not indigent under state public defender guidelines. RMC anticipates that this form can be used to appoint an attorney for persons in many different types of cases, including defendants in criminal matters, parents in CHIPS or TPR cases, subjects of involuntary mental commitment proceedings, or other proceedings. It uses the same standards and format established for the affidavits of indigency found in form CV-410.
Who Completes It:	The party seeking the indigency determination will complete the affidavit.
Distribution of Form:	Court. Copy to district attorney and attorney appointed. The party seeking the indigency determination will probably keep a copy.
Accompanying Forms:	Generally none, except some courts may require a copy of the appropriate pleadings (criminal complaint, petition for mental commitment, CHIPS petition, etc.) to be attached to the petition in order to assist in making a determination of the probable costs of representation.
New Form/Modification:	Modified; last update 05/20.
Modifications:	Added employer address and phone number.
Comments:	Although a person may not meet state public defender guidelines for appointment of an attorney, or the state public defender may not be able to appoint an attorney, there may still be constitutional or other considerations why an attorney should be appointed at county expense. This form allows the person to petition the court for appointment of an attorney, complete an affidavit of indigency and deliver it to court. The court would review the affidavit and make a determination of indigency and appoint an attorney if appropriate. If an attorney is appointed, the court must: • designate the attorney to be appointed and the payment rate

Approval Date: 04/09/2021
Release Date: 06/10/2021



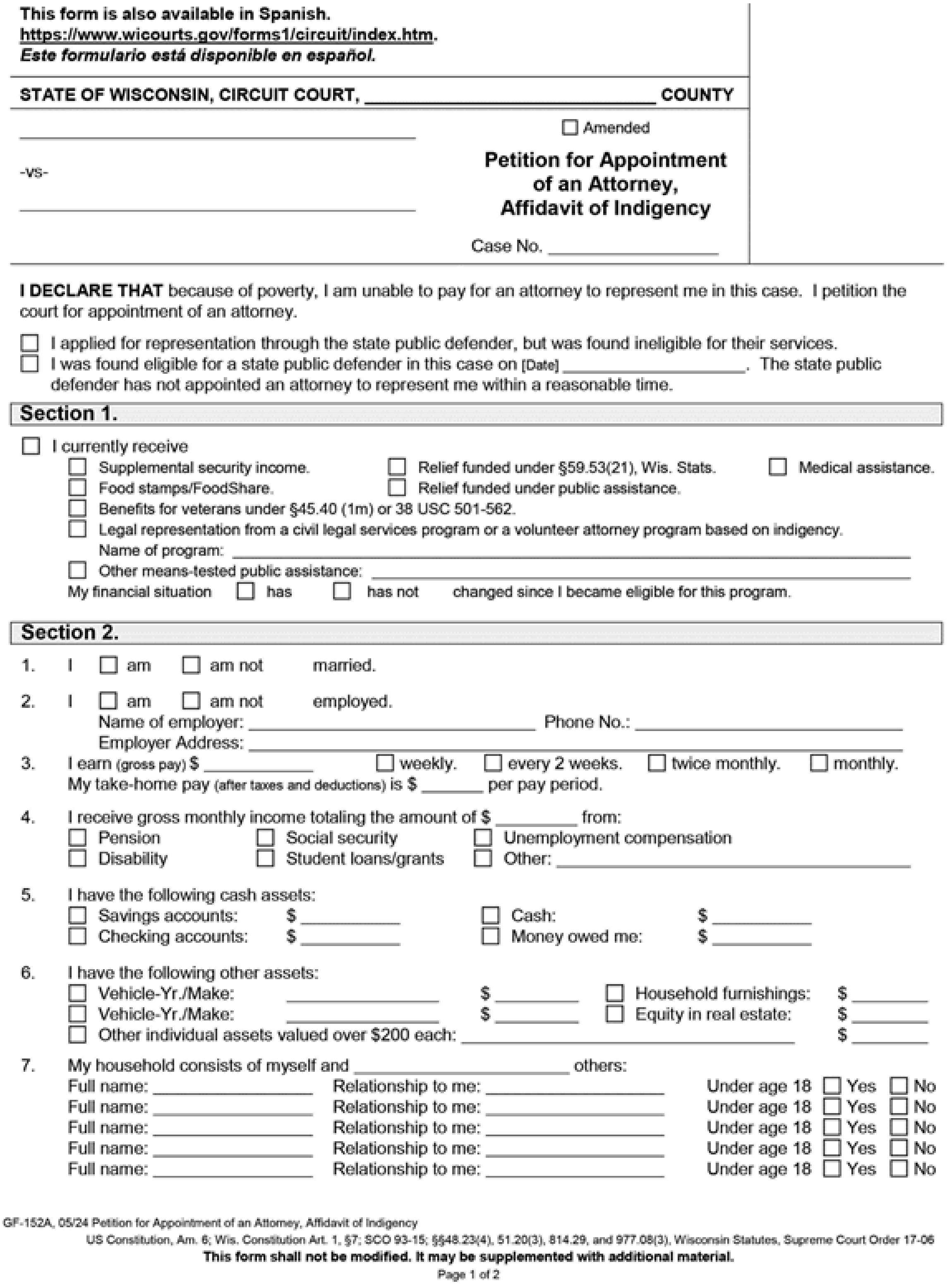
for the attorney (SPD rates or other), and,
- make a determination of whether the county should be reimbursed for the costs of that appointment and the schedule of payments that should be made.

The court may deny the request if:
- The person is not indigent (including if the affidavit is deemed to be untrue), or
- Other reasons. For example, in *Joni B. v. State*, 202 Wis.2d 1, 549 N.W.2d 411 (1996), the court set standards for determining the appropriateness of appointing an attorney for parents in CHIPS cases.

About this Form: This form is the product of the Wisconsin Records Management Committee, a committee of the Director of State Court's Office and a mandate of the Wisconsin Judicial Conference.

If you have additional information that does not change the meaning of the form, attach it on a separate page. The form itself shall not be altered.

Form 10.25D Petition for Appointment of an Attorney, Affidavit of Indigency (CRM-0153)



This form is also available in Spanish.
https://www.wicourts.gov/forms1/circuit/index.htm.
Este formulario está disponible en español.

STATE OF WISCONSIN, CIRCUIT COURT, ____________________ COUNTY

____
-vs-
____

☐ Amended

Petition for Appointment of an Attorney, Affidavit of Indigency

Case No. ____________

I DECLARE THAT because of poverty, I am unable to pay for an attorney to represent me in this case. I petition the court for appointment of an attorney.

☐ I applied for representation through the state public defender, but was found ineligible for their services.
☐ I was found eligible for a state public defender in this case on [Date] ____________. The state public defender has not appointed an attorney to represent me within a reasonable time.

Section 1.

☐ I currently receive
  ☐ Supplemental security income. ☐ Relief funded under §59.53(21), Wis. Stats. ☐ Medical assistance.
  ☐ Food stamps/FoodShare. ☐ Relief funded under public assistance.
  ☐ Benefits for veterans under §45.40 (1m) or 38 USC 501-562.
  ☐ Legal representation from a civil legal services program or a volunteer attorney program based on indigency.
  Name of program: ____________________
  ☐ Other means-tested public assistance: ____________________
  My financial situation ☐ has ☐ has not changed since I became eligible for this program.

Section 2.

1. I ☐ am ☐ am not married.

2. I ☐ am ☐ am not employed.
   Name of employer: ____________ Phone No.: ____________
   Employer Address: ____________________

3. I earn (gross pay) $ ________ ☐ weekly. ☐ every 2 weeks. ☐ twice monthly. ☐ monthly.
   My take-home pay (after taxes and deductions) is $ ______ per pay period.

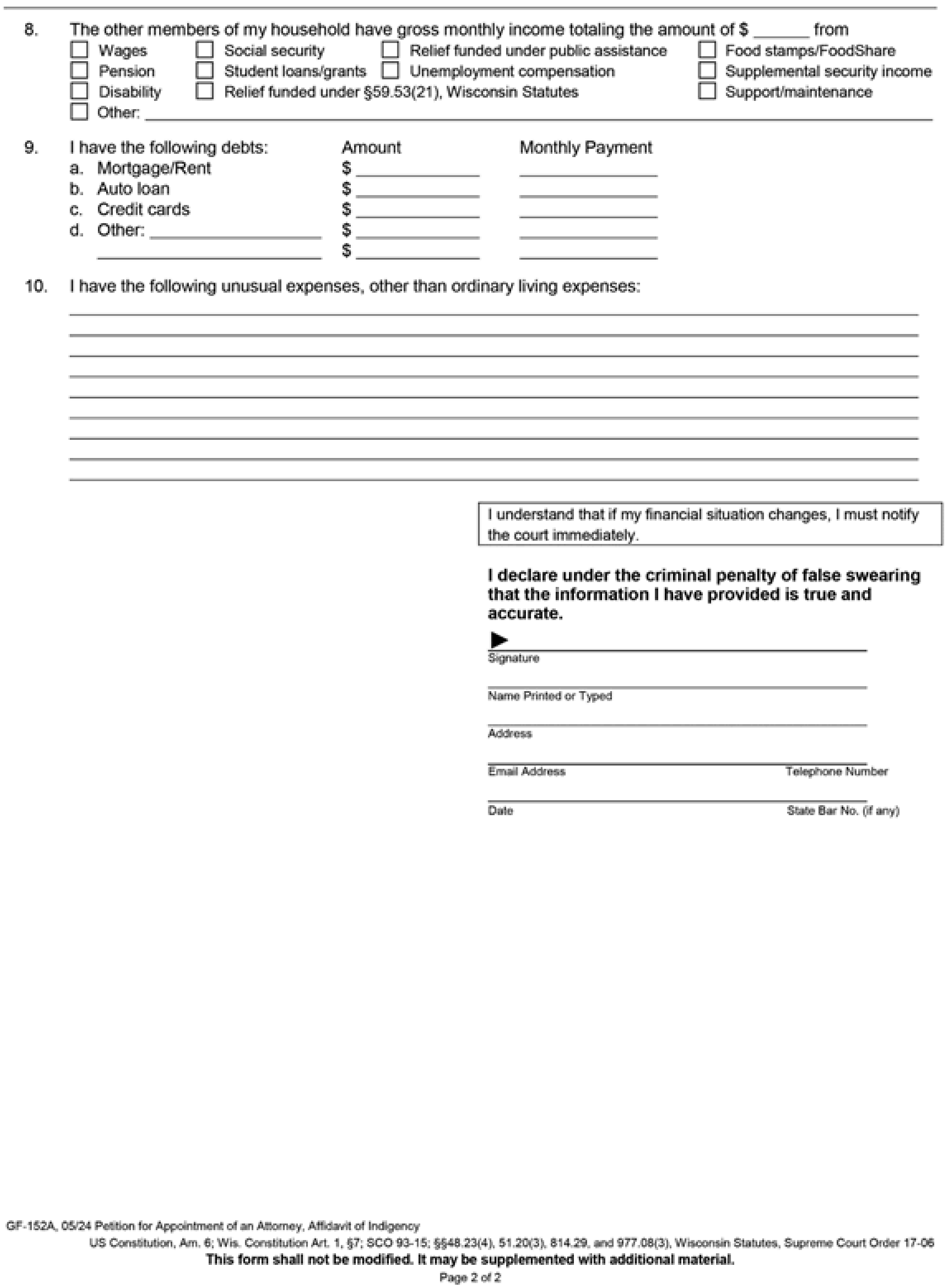
4. I receive gross monthly income totaling the amount of $ ______ from:
   ☐ Pension ☐ Social security ☐ Unemployment compensation
   ☐ Disability ☐ Student loans/grants ☐ Other: ____________

5. I have the following cash assets:
   ☐ Savings accounts: $ ________ ☐ Cash: $ ________
   ☐ Checking accounts: $ ________ ☐ Money owed me: $ ________

6. I have the following other assets:
   ☐ Vehicle-Yr./Make: ____________ $ ______ ☐ Household furnishings: $ ______
   ☐ Vehicle-Yr./Make: ____________ $ ______ ☐ Equity in real estate: $ ______
   ☐ Other individual assets valued over $200 each: ____________________ $ ______

7. My household consists of myself and ____________ others:
   Full name: ____________ Relationship to me: ____________ Under age 18 ☐ Yes ☐ No
   Full name: ____________ Relationship to me: ____________ Under age 18 ☐ Yes ☐ No
   Full name: ____________ Relationship to me: ____________ Under age 18 ☐ Yes ☐ No
   Full name: ____________ Relationship to me: ____________ Under age 18 ☐ Yes ☐ No
   Full name: ____________ Relationship to me: ____________ Under age 18 ☐ Yes ☐ No

GF-152A, 05/24 Petition for Appointment of an Attorney, Affidavit of Indigency
US Constitution, Am. 6; Wis. Constitution Art. 1, §7; SCO 93-15; §§48.23(4), 51.20(3), 814.29, and 977.08(3), Wisconsin Statutes, Supreme Court Order 17-06
This form shall not be modified. It may be supplemented with additional material.
Page 1 of 2



8. The other members of my household have gross monthly income totaling the amount of $ ______ from
☐ Wages
☐ Pension
☐ Disability
☐ Social security
☐ Student loans/grants
☐ Relief funded under §59.53(21), Wisconsin Statutes
☐ Relief funded under public assistance
☐ Unemployment compensation
☐ Food stamps/FoodShare
☐ Supplemental security income
☐ Support/maintenance
☐ Other: ____________________

9. I have the following debts:

	Amount	Monthly Payment
a. Mortgage/Rent	$ ________	________
b. Auto loan	$ ________	________
c. Credit cards	$ ________	________
d. Other: ________	$ ________	________
________	$ ________	________

10. I have the following unusual expenses, other than ordinary living expenses:

I understand that if my financial situation changes, I must notify the court immediately.

I declare under the criminal penalty of false swearing that the information I have provided is true and accurate.

▶ ____________________
Signature

Name Printed or Typed

Address

Email Address Telephone Number

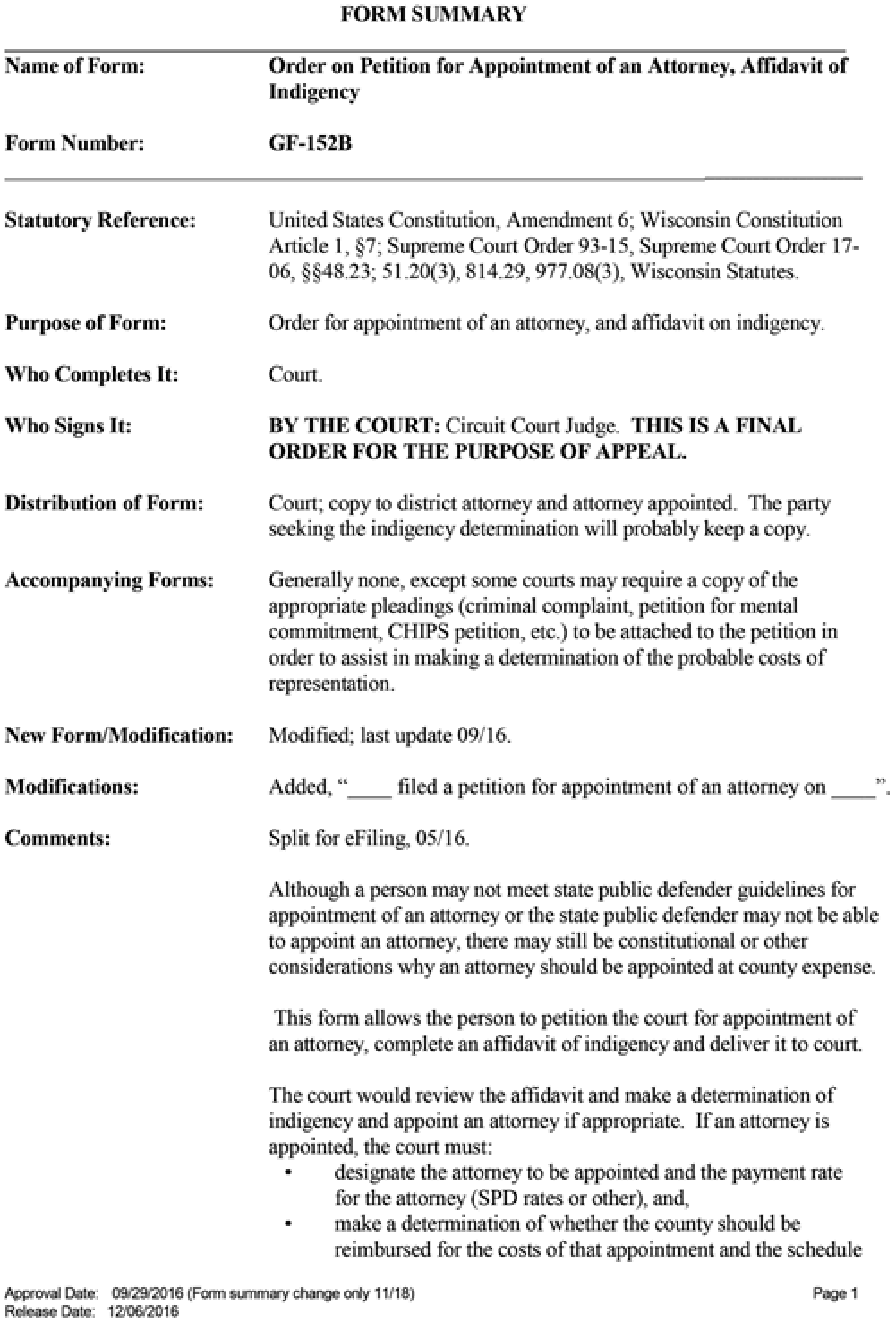
Date State Bar No. (if any)

GF-152A, 05/24 Petition for Appointment of an Attorney, Affidavit of Indigency
US Constitution, Am. 6; Wis. Constitution Art. 1, §7; SCO 93-15; §§48.23(4), 51.20(3), 814.29, and 977.08(3), Wisconsin Statutes, Supreme Court Order 17-06

This form shall not be modified. It may be supplemented with additional material.

Page 2 of 2

Form 10.25E Order on Petition for Appointment of an Attorney: Form Summary (CRM-0154)



FORM SUMMARY

Name of Form:	**Order on Petition for Appointment of an Attorney, Affidavit of Indigency**
Form Number:	**GF-152B**
Statutory Reference:	United States Constitution, Amendment 6; Wisconsin Constitution Article 1, §7; Supreme Court Order 93-15, Supreme Court Order 17-06, §§48.23; 51.20(3), 814.29, 977.08(3), Wisconsin Statutes.
Purpose of Form:	Order for appointment of an attorney, and affidavit on indigency.
Who Completes It:	Court.
Who Signs It:	**BY THE COURT:** Circuit Court Judge. **THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.**
Distribution of Form:	Court; copy to district attorney and attorney appointed. The party seeking the indigency determination will probably keep a copy.
Accompanying Forms:	Generally none, except some courts may require a copy of the appropriate pleadings (criminal complaint, petition for mental commitment, CHIPS petition, etc.) to be attached to the petition in order to assist in making a determination of the probable costs of representation.
New Form/Modification:	Modified; last update 09/16.
Modifications:	Added, "____ filed a petition for appointment of an attorney on ____".
Comments:	Split for eFiling, 05/16. Although a person may not meet state public defender guidelines for appointment of an attorney or the state public defender may not be able to appoint an attorney, there may still be constitutional or other considerations why an attorney should be appointed at county expense. This form allows the person to petition the court for appointment of an attorney, complete an affidavit of indigency and deliver it to court. The court would review the affidavit and make a determination of indigency and appoint an attorney if appropriate. If an attorney is appointed, the court must: • designate the attorney to be appointed and the payment rate for the attorney (SPD rates or other), and, • make a determination of whether the county should be reimbursed for the costs of that appointment and the schedule

Approval Date: 09/29/2016 (Form summary change only 11/18)
Release Date: 12/06/2016

of payments that should be made.

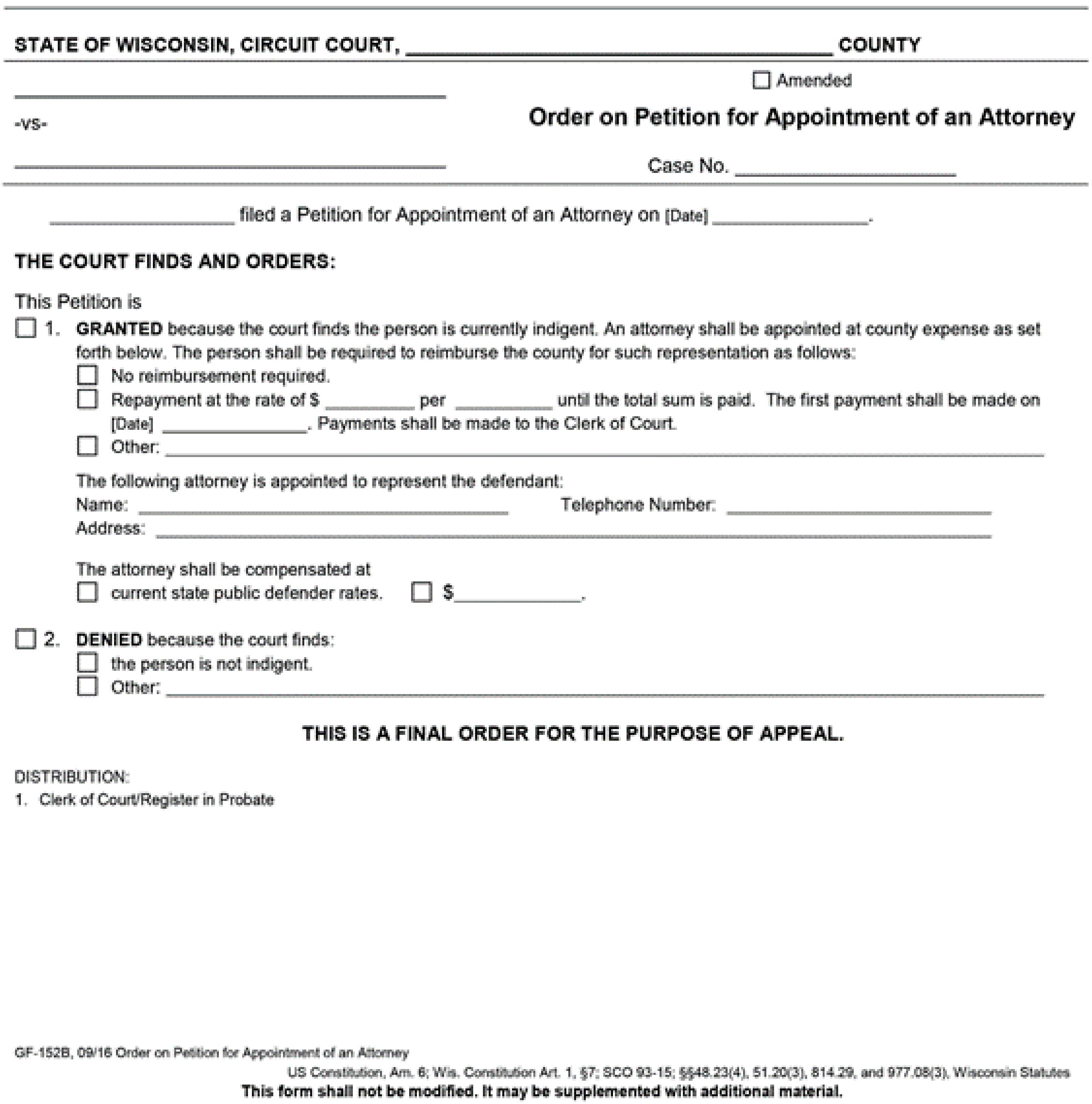
The court may deny the request if:

- The person is not indigent (including if the affidavit is deemed to be untrue), or
- Other reasons. For example, in *Joni B. v. State*, 202 Wis.2d 1, 549 N.W.2d 411 (1996), the court set standards for determining the appropriateness of appointing an attorney for parents in CHIPS cases.

About this Form: This form is the product of the Wisconsin Records Management Committee, a committee of the Director of State Court's Office and a mandate of the Wisconsin Judicial Conference.

If you have additional information that does not change the meaning of the form, attach it on a separate page. The form itself shall not be altered.

Form 10.25F Order on Petition for Appointment of an Attorney: Affidavit of Indigency (CRM-0155)



STATE OF WISCONSIN, CIRCUIT COURT, ____________________ COUNTY

____

-vs-

____

☐ Amended

Order on Petition for Appointment of an Attorney

Case No. ____________

____________ filed a Petition for Appointment of an Attorney on [Date] ____________.

THE COURT FINDS AND ORDERS:

This Petition is

☐ 1. **GRANTED** because the court finds the person is currently indigent. An attorney shall be appointed at county expense as set forth below. The person shall be required to reimburse the county for such representation as follows:
  - ☐ No reimbursement required.
  - ☐ Repayment at the rate of $ ________ per ________ until the total sum is paid. The first payment shall be made on [Date] ____________. Payments shall be made to the Clerk of Court.
  - ☐ Other: ____________________

The following attorney is appointed to represent the defendant:

Name: ____________________ Telephone Number: ____________________

Address: ____________________

The attorney shall be compensated at

☐ current state public defender rates. ☐ $__________.

☐ 2. **DENIED** because the court finds:
  - ☐ the person is not indigent.
  - ☐ Other: ____________________

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

DISTRIBUTION:

1. Clerk of Court/Register in Probate

GF-152B, 09/16 Order on Petition for Appointment of an Attorney

US Constitution, Am. 6; Wis. Constitution Art. 1, §7; SCO 93-15; §§48.23(4), 51.20(3), 814.29, and 977.08(3), Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

IV. SPD Private-Bar Certification Applications and CLE Form [§ 10.26]

Commentary and Instructions for Forms 10.26A–10.26G

Form 10.26A	Assigned Counsel Division—General Certification Application (CRM-0156)
Form 10.26B	Misdemeanor Certification List Request (CRM-0157)
Form 10.26C	Class B–I Felony Certification List Request (CRM-0158)
Form 10.26D	Class A Felony Certification List Request (CRM-0159)
Form 10.26E	Appellate Certification List Request (CRM-0160)
Form 10.26F	Trial—Litigation Experience and Training Requirements (CRM-0161)
Form 10.26G	Appellate—Litigation Experience and Training Requirements (CRM-0162)

The certification criteria for trial-level and appellate representation are outlined in the Quick Reference Guide to SPD Policies and Procedures, *supra* §§ 10.8–.15. Form 10.26A, *infra*, is the general certification form, which asks for general information and contains an acknowledgement that the attorney has reviewed the certification rules.

Forms 10.26B–10.26D, *infra*, are the certification request forms for trial-level cases and proceedings. *See* Wis. Admin. Code § PD 1.04(1)–(12) (criteria for trial-level certifications). Form 10.26E, *infra*, is the request form for appellate certification. *See* Wis. Admin. Code § PD 1.04(13) (criteria for appellate certification). Forms 10.26F and 10.26G, *infra*, are forms to report required litigation experience and training for trial-level and appellate certification, respectively. If applicants do not meet the requirements for a specific certification, but feel they have additional experience that should be taken into consideration for certification purposes, the attorney should include an explanation and additional information with the certification forms.

Any attorney certified to handle SPD cases must complete six hours of CLE each calendar year in SPD-approved courses. Wis. Admin. Code § PD 1.04(9). The CLE credits must be completed in areas substantially related to the work for which the attorney is or may be certified. CLE reporting must be done by January 1 of each year, and attorneys must report their CLE hours through the SPD online billing site, https://pb.opd.wi.gov/pbaccess/login.aspx (last visited Aug. 22, 2024), in addition to reporting CLE hours to the Board of Bar Examiners. Failure to meet the CLE requirement will result in loss of certification.

The SPD provides several training opportunities to satisfy the CLE requirement. Attorneys may contact the SPD Training Division, https://www.training.wispd.gov/ (last visited Aug. 22, 2024), for information about training opportunities. Attorneys should be aware that SPD-sponsored trainings can be applied toward the SPD CLE requirement to maintain certification, but not all SPD-sponsored trainings are approved for credit by the Board of Bar Examiners.

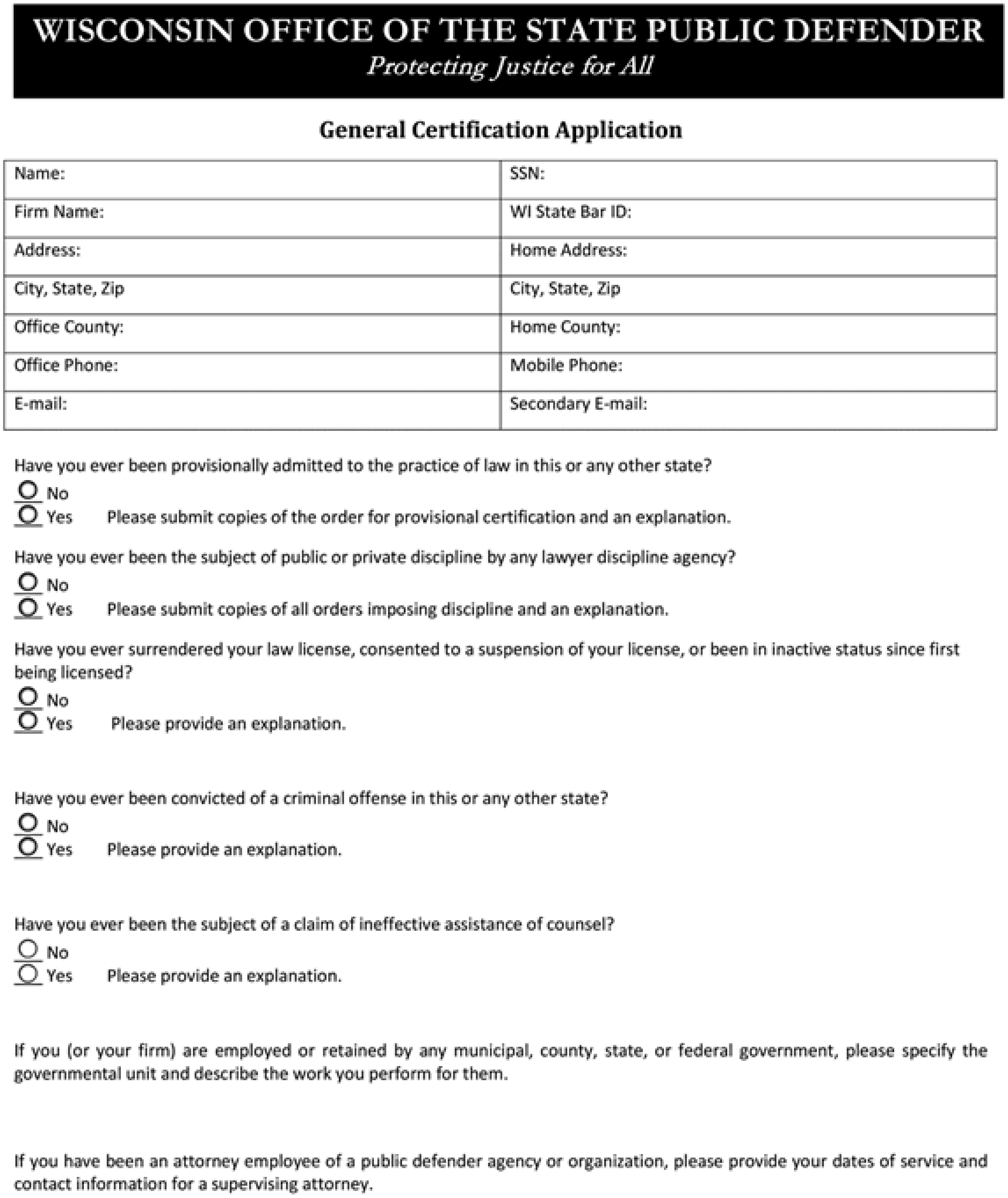
Distribution

Forms 10.26A–10.26G

Original:	SPD Assigned Counsel Division
Copy:	Attorney

Notes

Form 10.26A Assigned Counsel Division—General Certification Application (CRM-0156)



WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER

Protecting Justice for All

General Certification Application

Name:	SSN:
Firm Name:	WI State Bar ID:
Address:	Home Address:
City, State, Zip	City, State, Zip
Office County:	Home County:
Office Phone:	Mobile Phone:
E-mail:	Secondary E-mail:

Have you ever been provisionally admitted to the practice of law in this or any other state?

○ No
○ Yes Please submit copies of the order for provisional certification and an explanation.

Have you ever been the subject of public or private discipline by any lawyer discipline agency?

○ No
○ Yes Please submit copies of all orders imposing discipline and an explanation.

Have you ever surrendered your law license, consented to a suspension of your license, or been in inactive status since first being licensed?

○ No
○ Yes Please provide an explanation.

Have you ever been convicted of a criminal offense in this or any other state?

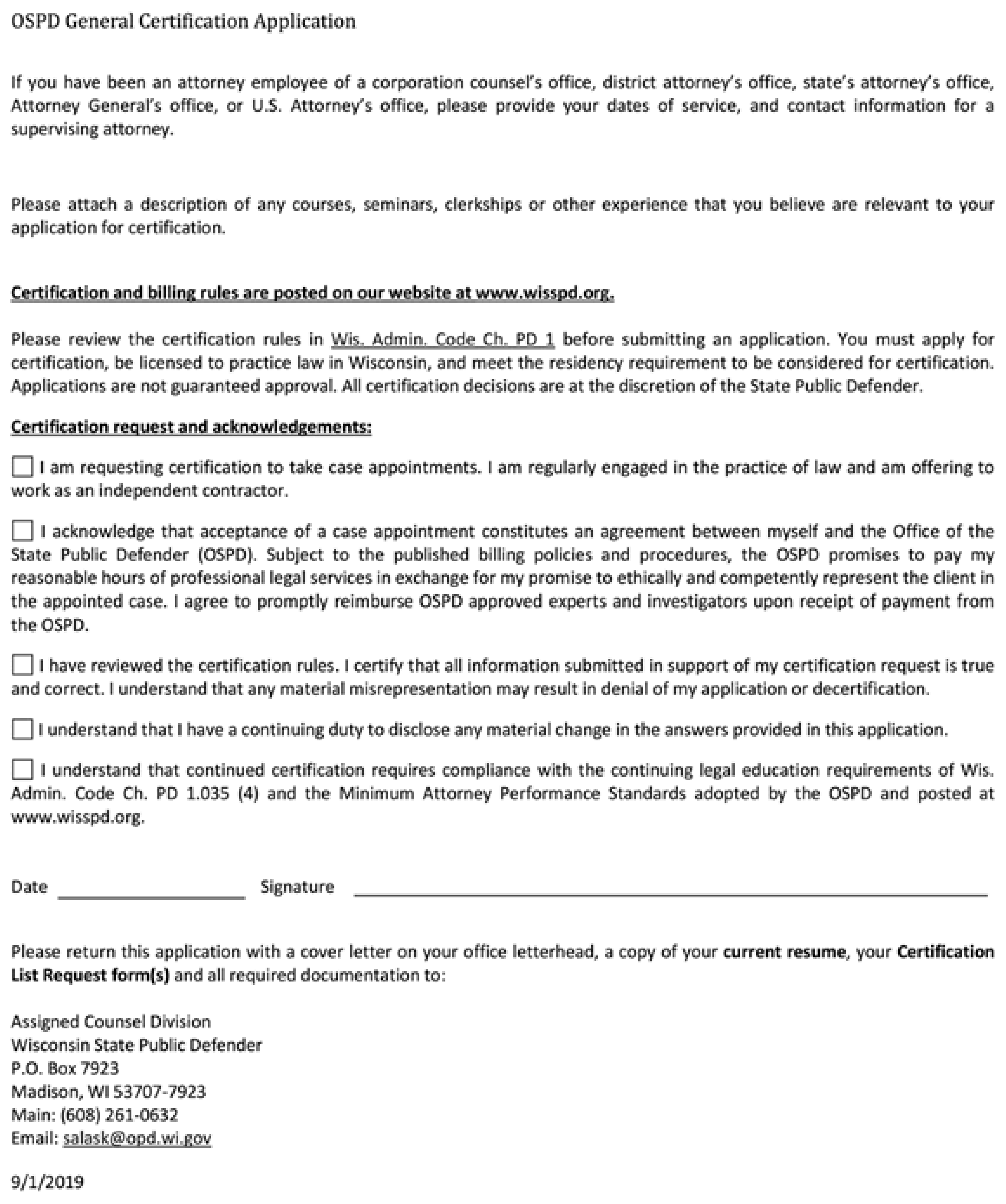
○ No
○ Yes Please provide an explanation.

Have you ever been the subject of a claim of ineffective assistance of counsel?

○ No
○ Yes Please provide an explanation.

If you (or your firm) are employed or retained by any municipal, county, state, or federal government, please specify the governmental unit and describe the work you perform for them.

If you have been an attorney employee of a public defender agency or organization, please provide your dates of service and contact information for a supervising attorney.



OSPD General Certification Application

If you have been an attorney employee of a corporation counsel's office, district attorney's office, state's attorney's office, Attorney General's office, or U.S. Attorney's office, please provide your dates of service, and contact information for a supervising attorney.

Please attach a description of any courses, seminars, clerkships or other experience that you believe are relevant to your application for certification.

Certification and billing rules are posted on our website at www.wisspd.org.

Please review the certification rules in Wis. Admin. Code Ch. PD 1 before submitting an application. You must apply for certification, be licensed to practice law in Wisconsin, and meet the residency requirement to be considered for certification. Applications are not guaranteed approval. All certification decisions are at the discretion of the State Public Defender.

Certification request and acknowledgements:

☐ I am requesting certification to take case appointments. I am regularly engaged in the practice of law and am offering to work as an independent contractor.

☐ I acknowledge that acceptance of a case appointment constitutes an agreement between myself and the Office of the State Public Defender (OSPD). Subject to the published billing policies and procedures, the OSPD promises to pay my reasonable hours of professional legal services in exchange for my promise to ethically and competently represent the client in the appointed case. I agree to promptly reimburse OSPD approved experts and investigators upon receipt of payment from the OSPD.

☐ I have reviewed the certification rules. I certify that all information submitted in support of my certification request is true and correct. I understand that any material misrepresentation may result in denial of my application or decertification.

☐ I understand that I have a continuing duty to disclose any material change in the answers provided in this application.

☐ I understand that continued certification requires compliance with the continuing legal education requirements of Wis. Admin. Code Ch. PD 1.035 (4) and the Minimum Attorney Performance Standards adopted by the OSPD and posted at www.wisspd.org.

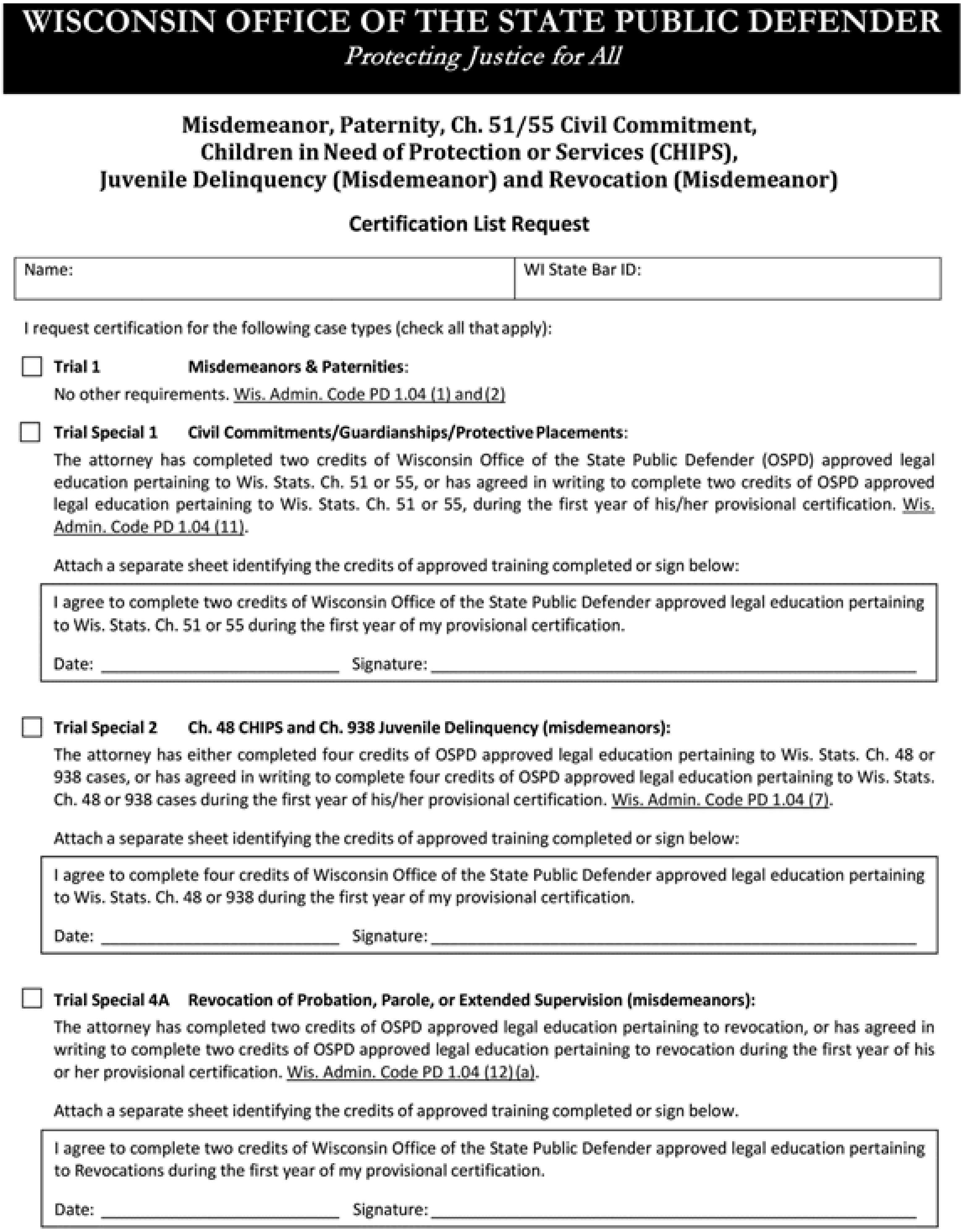
Date ____________________ Signature ____

Please return this application with a cover letter on your office letterhead, a copy of your **current resume**, your **Certification List Request form(s)** and all required documentation to:

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
Main: (608) 261-0632
Email: salask@opd.wi.gov

9/1/2019

Form 10.26B Misdemeanor Certification List Request (CRM-0157)



WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER
Protecting Justice for All

Misdemeanor, Paternity, Ch. 51/55 Civil Commitment, Children in Need of Protection or Services (CHIPS), Juvenile Delinquency (Misdemeanor) and Revocation (Misdemeanor)

Certification List Request

Name:	WI State Bar ID:

I request certification for the following case types (check all that apply):

☐ **Trial 1** **Misdemeanors & Paternities:**
No other requirements. Wis. Admin. Code PD 1.04 (1) and (2)

☐ **Trial Special 1** **Civil Commitments/Guardianships/Protective Placements:**
The attorney has completed two credits of Wisconsin Office of the State Public Defender (OSPD) approved legal education pertaining to Wis. Stats. Ch. 51 or 55, or has agreed in writing to complete two credits of OSPD approved legal education pertaining to Wis. Stats. Ch. 51 or 55, during the first year of his/her provisional certification. Wis. Admin. Code PD 1.04 (11).

Attach a separate sheet identifying the credits of approved training completed or sign below:

I agree to complete two credits of Wisconsin Office of the State Public Defender approved legal education pertaining to Wis. Stats. Ch. 51 or 55 during the first year of my provisional certification.

Date: ____________________ Signature: ____

☐ **Trial Special 2** **Ch. 48 CHIPS and Ch. 938 Juvenile Delinquency (misdemeanors):**
The attorney has either completed four credits of OSPD approved legal education pertaining to Wis. Stats. Ch. 48 or 938 cases, or has agreed in writing to complete four credits of OSPD approved legal education pertaining to Wis. Stats. Ch. 48 or 938 cases during the first year of his/her provisional certification. Wis. Admin. Code PD 1.04 (7).

Attach a separate sheet identifying the credits of approved training completed or sign below:

I agree to complete four credits of Wisconsin Office of the State Public Defender approved legal education pertaining to Wis. Stats. Ch. 48 or 938 during the first year of my provisional certification.

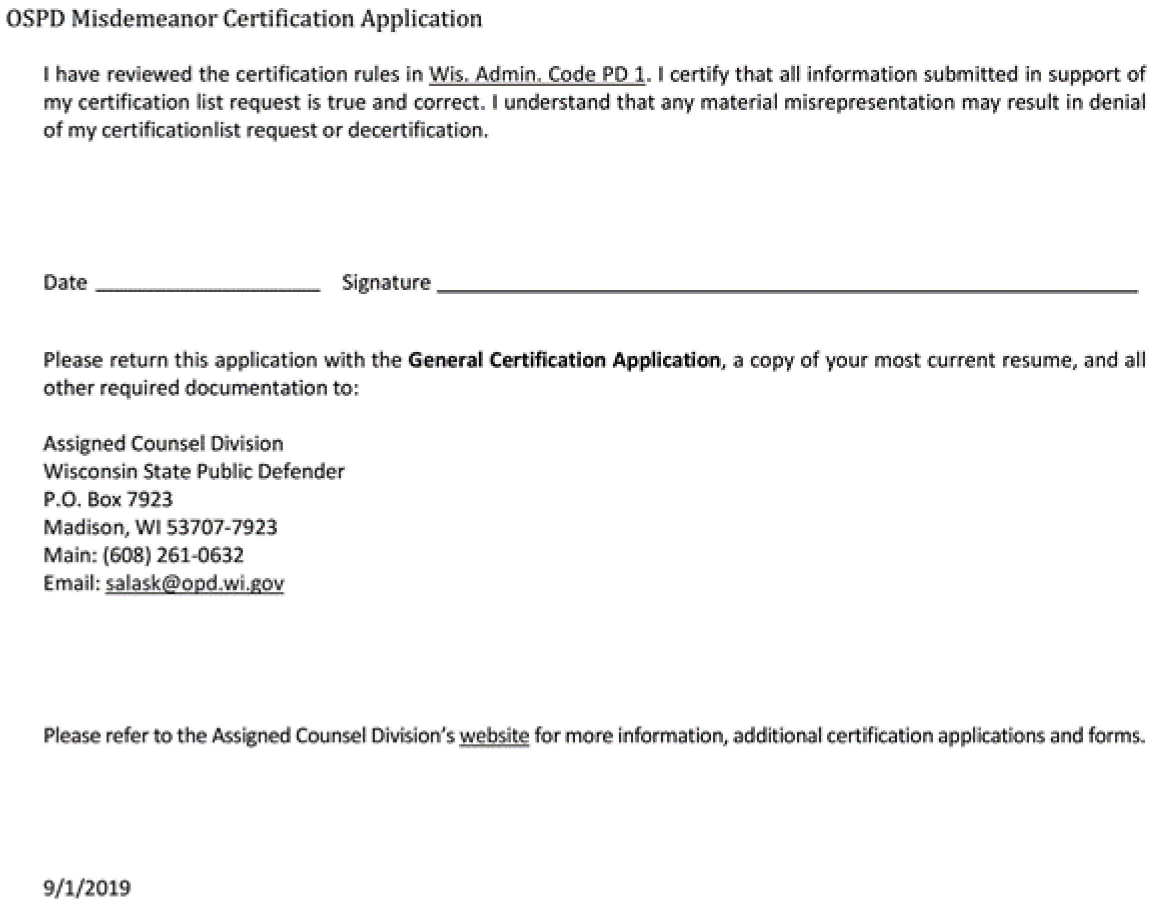
Date: ____________________ Signature: ____

☐ **Trial Special 4A** **Revocation of Probation, Parole, or Extended Supervision (misdemeanors):**
The attorney has completed two credits of OSPD approved legal education pertaining to revocation, or has agreed in writing to complete two credits of OSPD approved legal education pertaining to revocation during the first year of his or her provisional certification. Wis. Admin. Code PD 1.04 (12)(a).

Attach a separate sheet identifying the credits of approved training completed or sign below.

I agree to complete two credits of Wisconsin Office of the State Public Defender approved legal education pertaining to Revocations during the first year of my provisional certification.

Date: ____________________ Signature: ____



OSPD Misdemeanor Certification Application

I have reviewed the certification rules in Wis. Admin. Code PD 1. I certify that all information submitted in support of my certification list request is true and correct. I understand that any material misrepresentation may result in denial of my certificationlist request or decertification.

Date ______________________ Signature ____

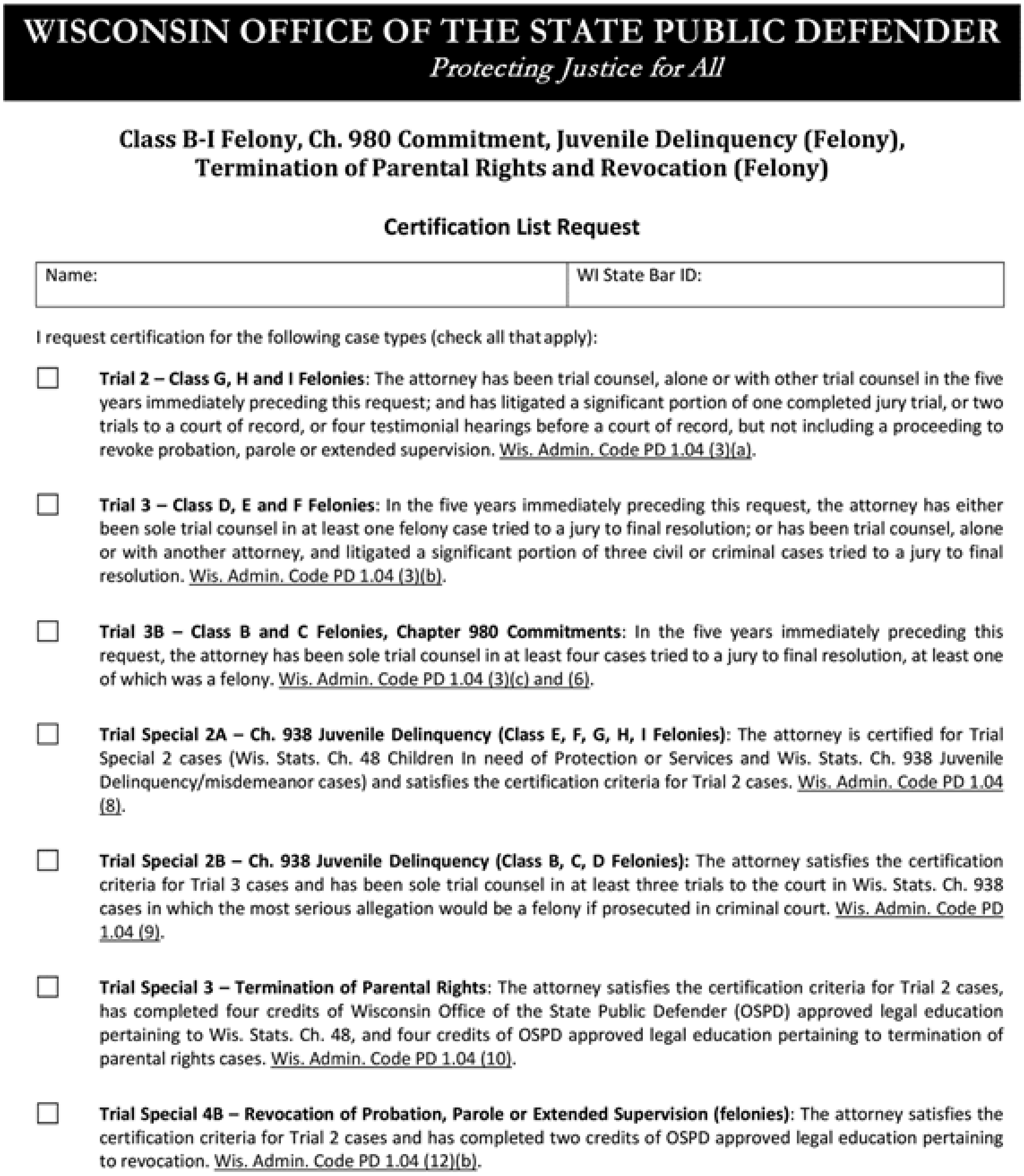
Please return this application with the **General Certification Application**, a copy of your most current resume, and all other required documentation to:

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
Main: (608) 261-0632
Email: salask@opd.wi.gov

Please refer to the Assigned Counsel Division's website for more information, additional certification applications and forms.

9/1/2019

Form 10.26C Class B–I Felony Certification List Request (CRM-0158)



WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER

Protecting Justice for All

Class B-I Felony, Ch. 980 Commitment, Juvenile Delinquency (Felony), Termination of Parental Rights and Revocation (Felony)

Certification List Request

Name:	WI State Bar ID:

I request certification for the following case types (check all that apply):

☐ **Trial 2 – Class G, H and I Felonies**: The attorney has been trial counsel, alone or with other trial counsel in the five years immediately preceding this request; and has litigated a significant portion of one completed jury trial, or two trials to a court of record, or four testimonial hearings before a court of record, but not including a proceeding to revoke probation, parole or extended supervision. Wis. Admin. Code PD 1.04 (3)(a).

☐ **Trial 3 – Class D, E and F Felonies**: In the five years immediately preceding this request, the attorney has either been sole trial counsel in at least one felony case tried to a jury to final resolution; or has been trial counsel, alone or with another attorney, and litigated a significant portion of three civil or criminal cases tried to a jury to final resolution. Wis. Admin. Code PD 1.04 (3)(b).

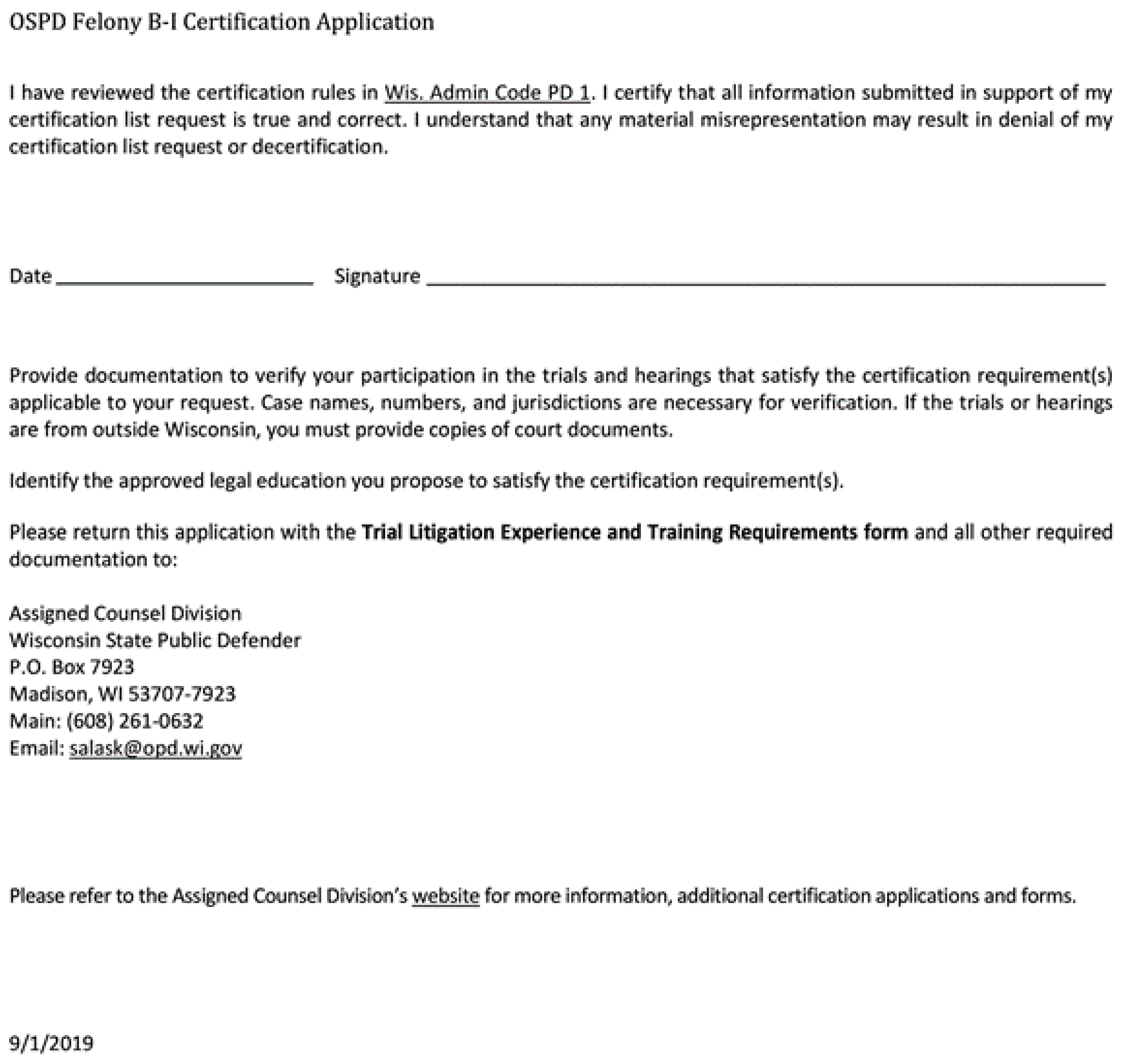
☐ **Trial 3B – Class B and C Felonies, Chapter 980 Commitments**: In the five years immediately preceding this request, the attorney has been sole trial counsel in at least four cases tried to a jury to final resolution, at least one of which was a felony. Wis. Admin. Code PD 1.04 (3)(c) and (6).

☐ **Trial Special 2A – Ch. 938 Juvenile Delinquency (Class E, F, G, H, I Felonies)**: The attorney is certified for Trial Special 2 cases (Wis. Stats. Ch. 48 Children In need of Protection or Services and Wis. Stats. Ch. 938 Juvenile Delinquency/misdemeanor cases) and satisfies the certification criteria for Trial 2 cases. Wis. Admin. Code PD 1.04 (8).

☐ **Trial Special 2B – Ch. 938 Juvenile Delinquency (Class B, C, D Felonies):** The attorney satisfies the certification criteria for Trial 3 cases and has been sole trial counsel in at least three trials to the court in Wis. Stats. Ch. 938 cases in which the most serious allegation would be a felony if prosecuted in criminal court. Wis. Admin. Code PD 1.04 (9).

☐ **Trial Special 3 – Termination of Parental Rights**: The attorney satisfies the certification criteria for Trial 2 cases, has completed four credits of Wisconsin Office of the State Public Defender (OSPD) approved legal education pertaining to Wis. Stats. Ch. 48, and four credits of OSPD approved legal education pertaining to termination of parental rights cases. Wis. Admin. Code PD 1.04 (10).

☐ **Trial Special 4B – Revocation of Probation, Parole or Extended Supervision (felonies)**: The attorney satisfies the certification criteria for Trial 2 cases and has completed two credits of OSPD approved legal education pertaining to revocation. Wis. Admin. Code PD 1.04 (12)(b).



OSPD Felony B-I Certification Application

I have reviewed the certification rules in Wis. Admin Code PD 1. I certify that all information submitted in support of my certification list request is true and correct. I understand that any material misrepresentation may result in denial of my certification list request or decertification.

Date ________________________ Signature ____

Provide documentation to verify your participation in the trials and hearings that satisfy the certification requirement(s) applicable to your request. Case names, numbers, and jurisdictions are necessary for verification. If the trials or hearings are from outside Wisconsin, you must provide copies of court documents.

Identify the approved legal education you propose to satisfy the certification requirement(s).

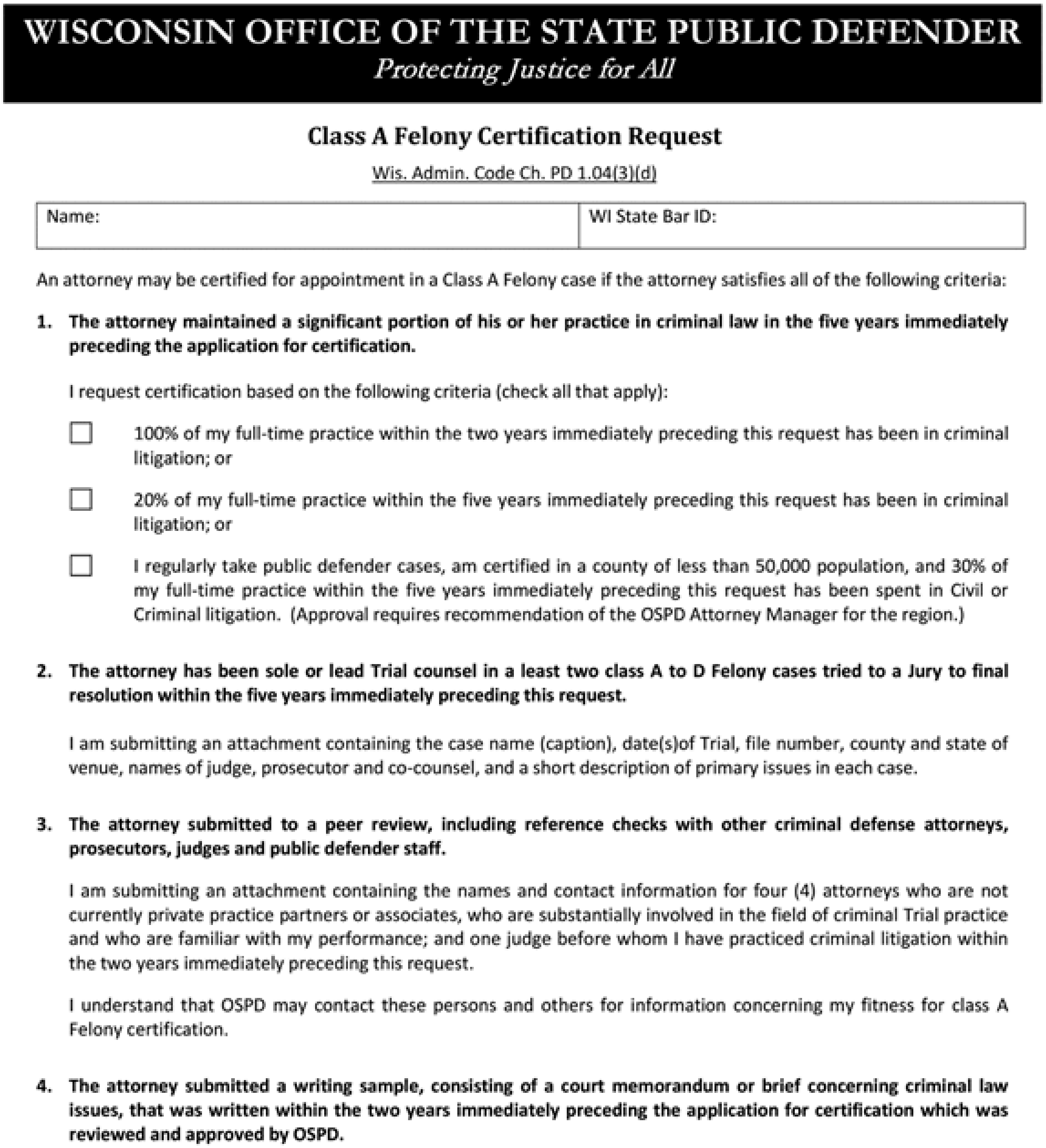
Please return this application with the **Trial Litigation Experience and Training Requirements form** and all other required documentation to:

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
Main: (608) 261-0632
Email: salask@opd.wi.gov

Please refer to the Assigned Counsel Division's website for more information, additional certification applications and forms.

9/1/2019

Form 10.26D Class A Felony Certification List Request (CRM-0159)



WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER

Protecting Justice for All

Class A Felony Certification Request

Wis. Admin. Code Ch. PD 1.04(3)(d)

Name:	WI State Bar ID:

An attorney may be certified for appointment in a Class A Felony case if the attorney satisfies all of the following criteria:

1. **The attorney maintained a significant portion of his or her practice in criminal law in the five years immediately preceding the application for certification.**

   I request certification based on the following criteria (check all that apply):

   ☐ 100% of my full-time practice within the two years immediately preceding this request has been in criminal litigation; or

   ☐ 20% of my full-time practice within the five years immediately preceding this request has been in criminal litigation; or

   ☐ I regularly take public defender cases, am certified in a county of less than 50,000 population, and 30% of my full-time practice within the five years immediately preceding this request has been spent in Civil or Criminal litigation. (Approval requires recommendation of the OSPD Attorney Manager for the region.)

2. **The attorney has been sole or lead Trial counsel in a least two class A to D Felony cases tried to a Jury to final resolution within the five years immediately preceding this request.**

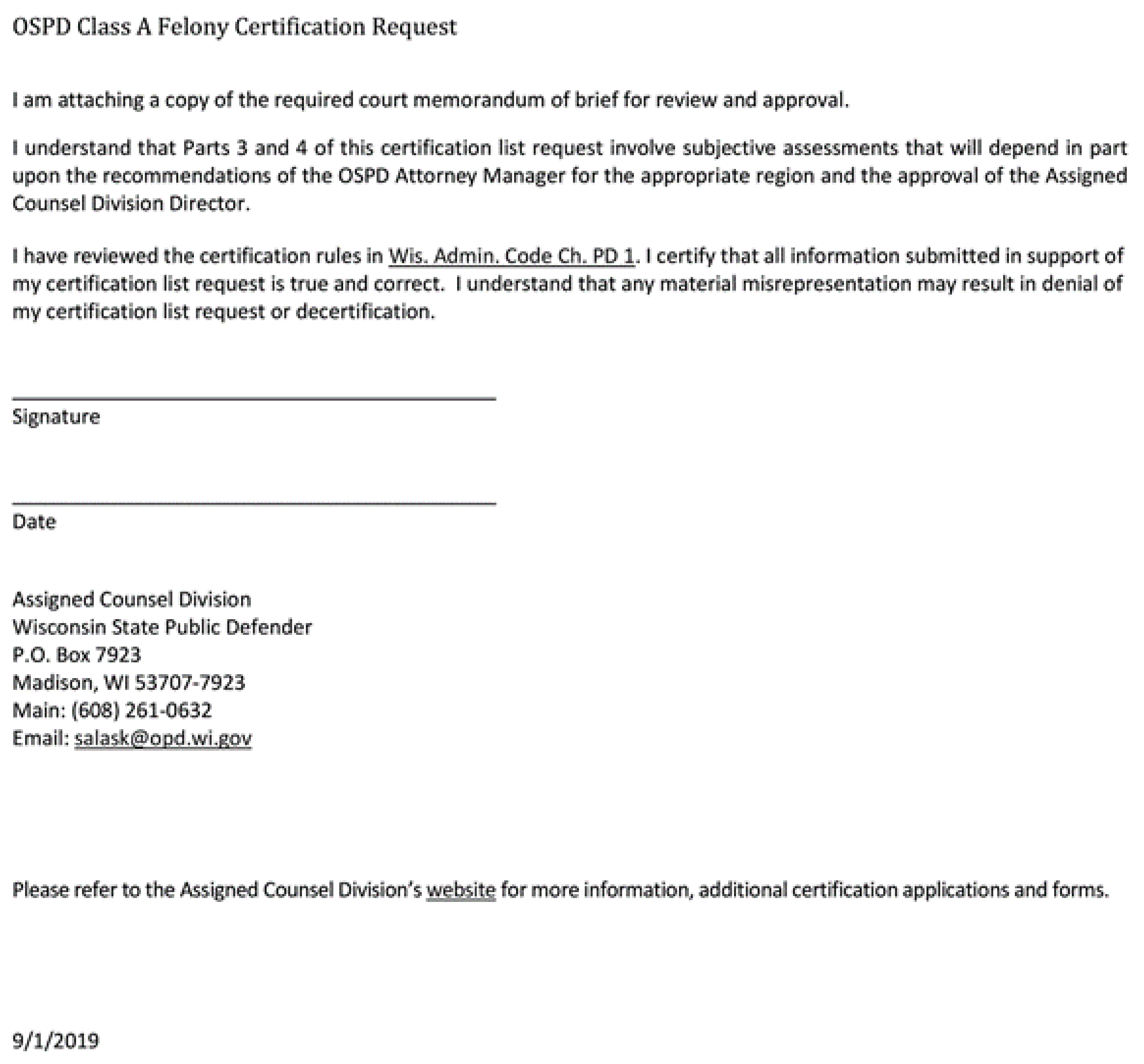
   I am submitting an attachment containing the case name (caption), date(s)of Trial, file number, county and state of venue, names of judge, prosecutor and co-counsel, and a short description of primary issues in each case.

3. **The attorney submitted to a peer review, including reference checks with other criminal defense attorneys, prosecutors, judges and public defender staff.**

   I am submitting an attachment containing the names and contact information for four (4) attorneys who are not currently private practice partners or associates, who are substantially involved in the field of criminal Trial practice and who are familiar with my performance; and one judge before whom I have practiced criminal litigation within the two years immediately preceding this request.

   I understand that OSPD may contact these persons and others for information concerning my fitness for class A Felony certification.

4. **The attorney submitted a writing sample, consisting of a court memorandum or brief concerning criminal law issues, that was written within the two years immediately preceding the application for certification which was reviewed and approved by OSPD.**



OSPD Class A Felony Certification Request

I am attaching a copy of the required court memorandum of brief for review and approval.

I understand that Parts 3 and 4 of this certification list request involve subjective assessments that will depend in part upon the recommendations of the OSPD Attorney Manager for the appropriate region and the approval of the Assigned Counsel Division Director.

I have reviewed the certification rules in Wis. Admin. Code Ch. PD 1. I certify that all information submitted in support of my certification list request is true and correct. I understand that any material misrepresentation may result in denial of my certification list request or decertification.

____
Signature

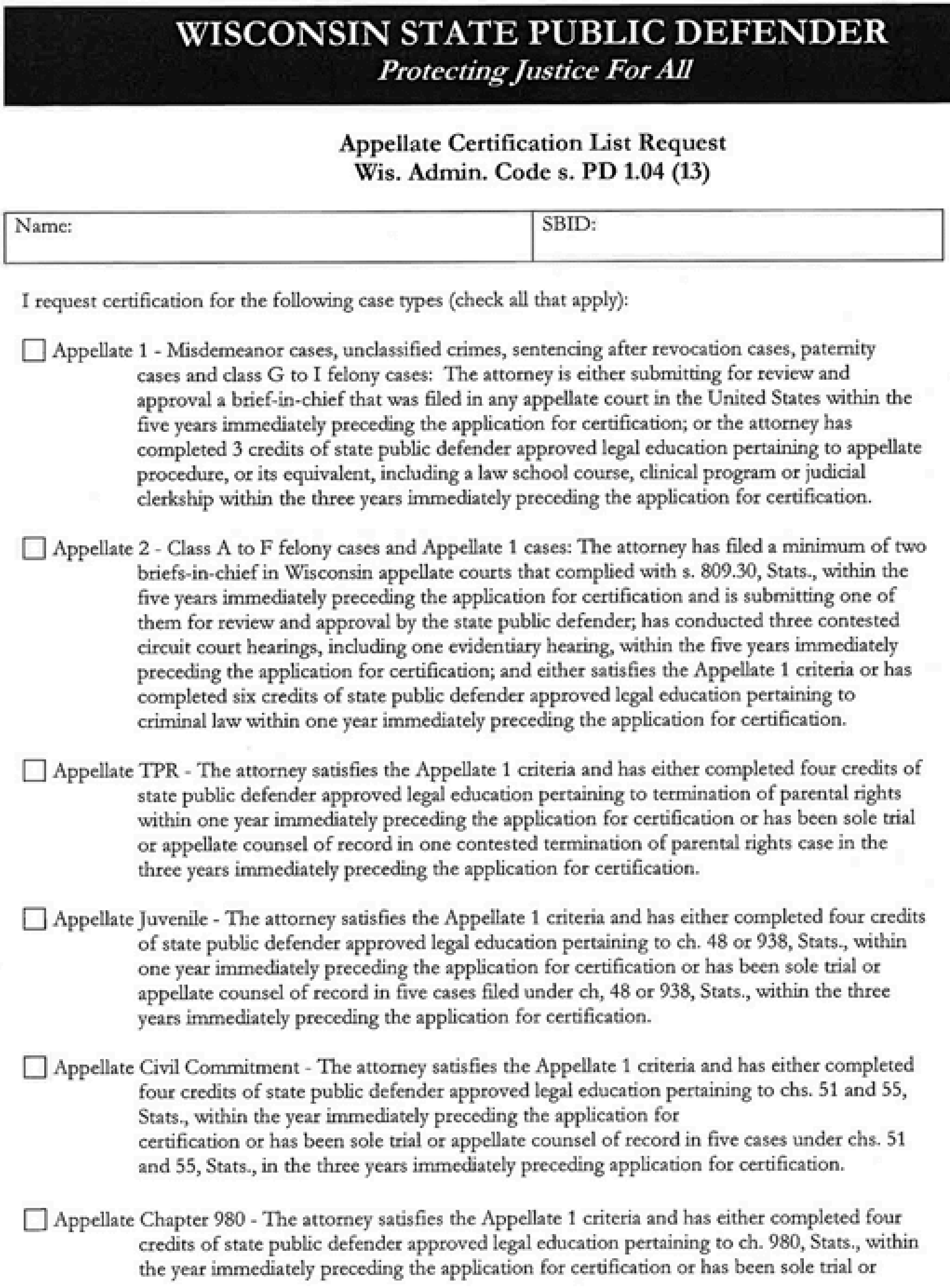
____
Date

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
Main: (608) 261-0632
Email: salask@opd.wi.gov

Please refer to the Assigned Counsel Division's website for more information, additional certification applications and forms.

9/1/2019

Form 10.26E Appellate Certification List (CRM-0160)



WISCONSIN STATE PUBLIC DEFENDER
Protecting Justice For All

Appellate Certification List Request
Wis. Admin. Code s. PD 1.04 (13)

Name:	SBID:

I request certification for the following case types (check all that apply):

☐ Appellate 1 - Misdemeanor cases, unclassified crimes, sentencing after revocation cases, paternity cases and class G to I felony cases: The attorney is either submitting for review and approval a brief-in-chief that was filed in any appellate court in the United States within the five years immediately preceding the application for certification; or the attorney has completed 3 credits of state public defender approved legal education pertaining to appellate procedure, or its equivalent, including a law school course, clinical program or judicial clerkship within the three years immediately preceding the application for certification.

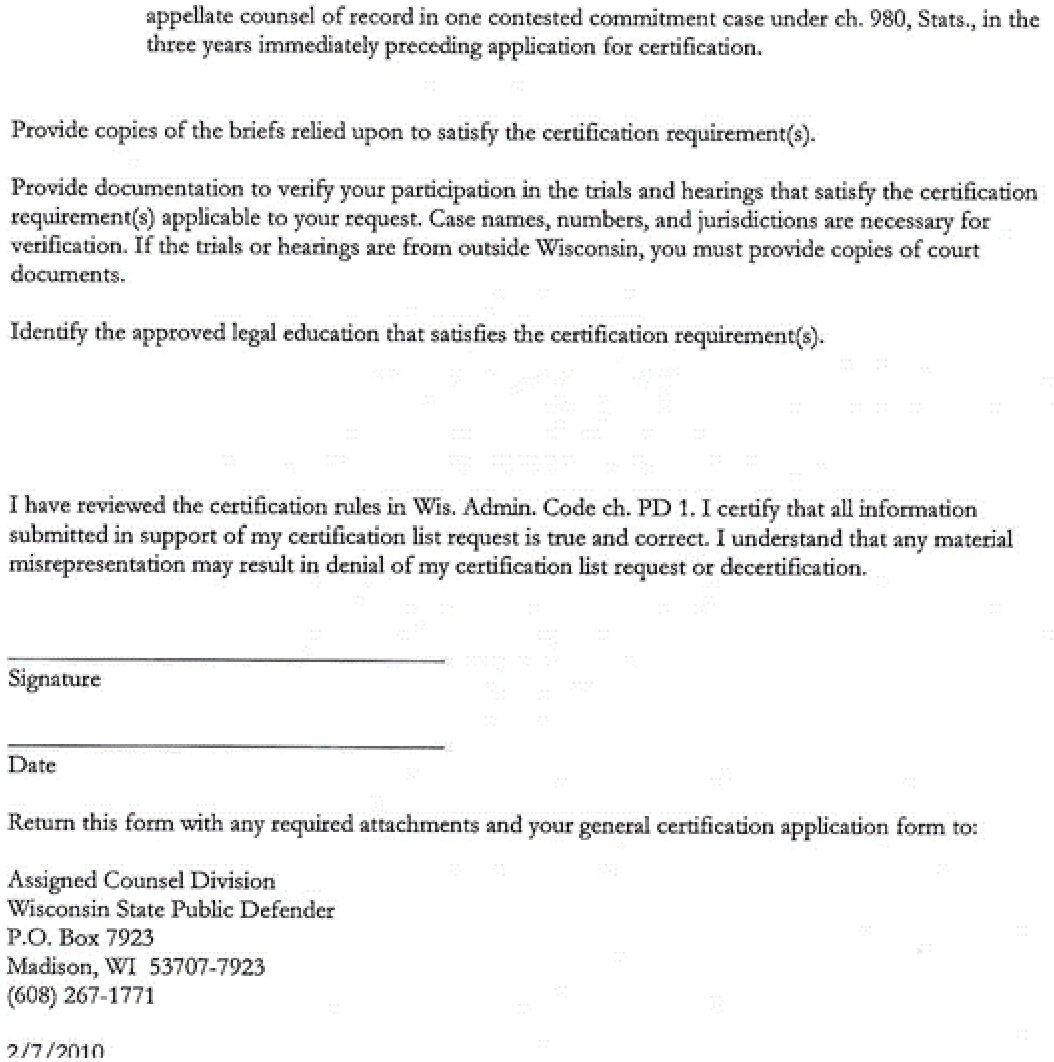
☐ Appellate 2 - Class A to F felony cases and Appellate 1 cases: The attorney has filed a minimum of two briefs-in-chief in Wisconsin appellate courts that complied with s. 809.30, Stats., within the five years immediately preceding the application for certification and is submitting one of them for review and approval by the state public defender; has conducted three contested circuit court hearings, including one evidentiary hearing, within the five years immediately preceding the application for certification; and either satisfies the Appellate 1 criteria or has completed six credits of state public defender approved legal education pertaining to criminal law within one year immediately preceding the application for certification.

☐ Appellate TPR - The attorney satisfies the Appellate 1 criteria and has either completed four credits of state public defender approved legal education pertaining to termination of parental rights within one year immediately preceding the application for certification or has been sole trial or appellate counsel of record in one contested termination of parental rights case in the three years immediately preceding the application for certification.

☐ Appellate Juvenile - The attorney satisfies the Appellate 1 criteria and has either completed four credits of state public defender approved legal education pertaining to ch. 48 or 938, Stats., within one year immediately preceding the application for certification or has been sole trial or appellate counsel of record in five cases filed under ch, 48 or 938, Stats., within the three years immediately preceding the application for certification.

☐ Appellate Civil Commitment - The attorney satisfies the Appellate 1 criteria and has either completed four credits of state public defender approved legal education pertaining to chs. 51 and 55, Stats., within the year immediately preceding the application for certification or has been sole trial or appellate counsel of record in five cases under chs. 51 and 55, Stats., in the three years immediately preceding application for certification.

☐ Appellate Chapter 980 - The attorney satisfies the Appellate 1 criteria and has either completed four credits of state public defender approved legal education pertaining to ch. 980, Stats., within the year immediately preceding the application for certification or has been sole trial or



appellate counsel of record in one contested commitment case under ch. 980, Stats., in the three years immediately preceding application for certification.

Provide copies of the briefs relied upon to satisfy the certification requirement(s).

Provide documentation to verify your participation in the trials and hearings that satisfy the certification requirement(s) applicable to your request. Case names, numbers, and jurisdictions are necessary for verification. If the trials or hearings are from outside Wisconsin, you must provide copies of court documents.

Identify the approved legal education that satisfies the certification requirement(s).

I have reviewed the certification rules in Wis. Admin. Code ch. PD 1. I certify that all information submitted in support of my certification list request is true and correct. I understand that any material misrepresentation may result in denial of my certification list request or decertification.

____
Signature

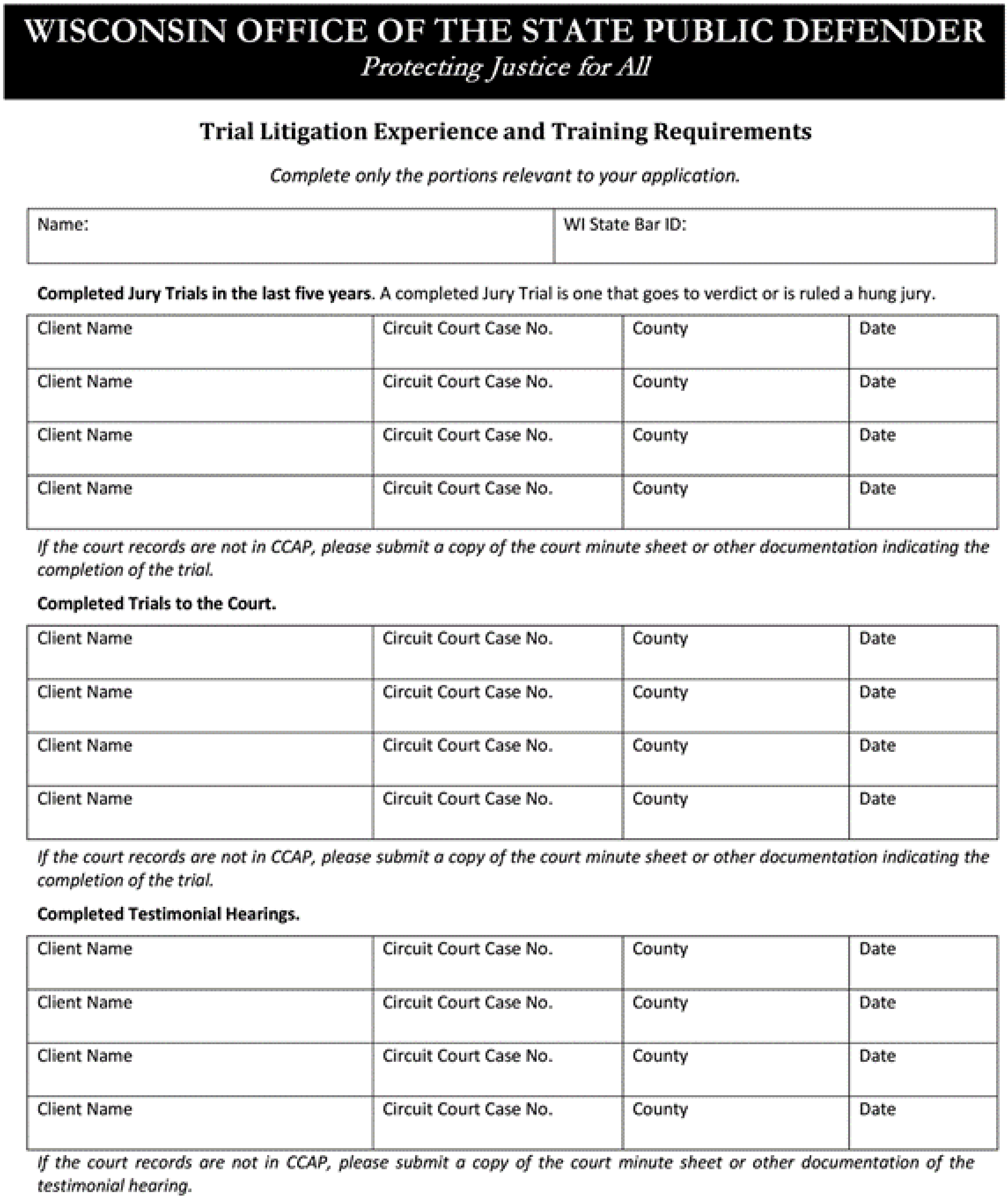
____
Date

Return this form with any required attachments and your general certification application form to:

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
(608) 267-1771

2/7/2010

Form 10.26F Trial—Litigation Experience and Training Requirements (CRM-0161)



WISCONSIN OFFICE OF THE STATE PUBLIC DEFENDER
Protecting Justice for All

Trial Litigation Experience and Training Requirements

Complete only the portions relevant to your application.

Name:	WI State Bar ID:

Completed Jury Trials in the last five years. A completed Jury Trial is one that goes to verdict or is ruled a hung jury.

Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date

If the court records are not in CCAP, please submit a copy of the court minute sheet or other documentation indicating the completion of the trial.

Completed Trials to the Court.

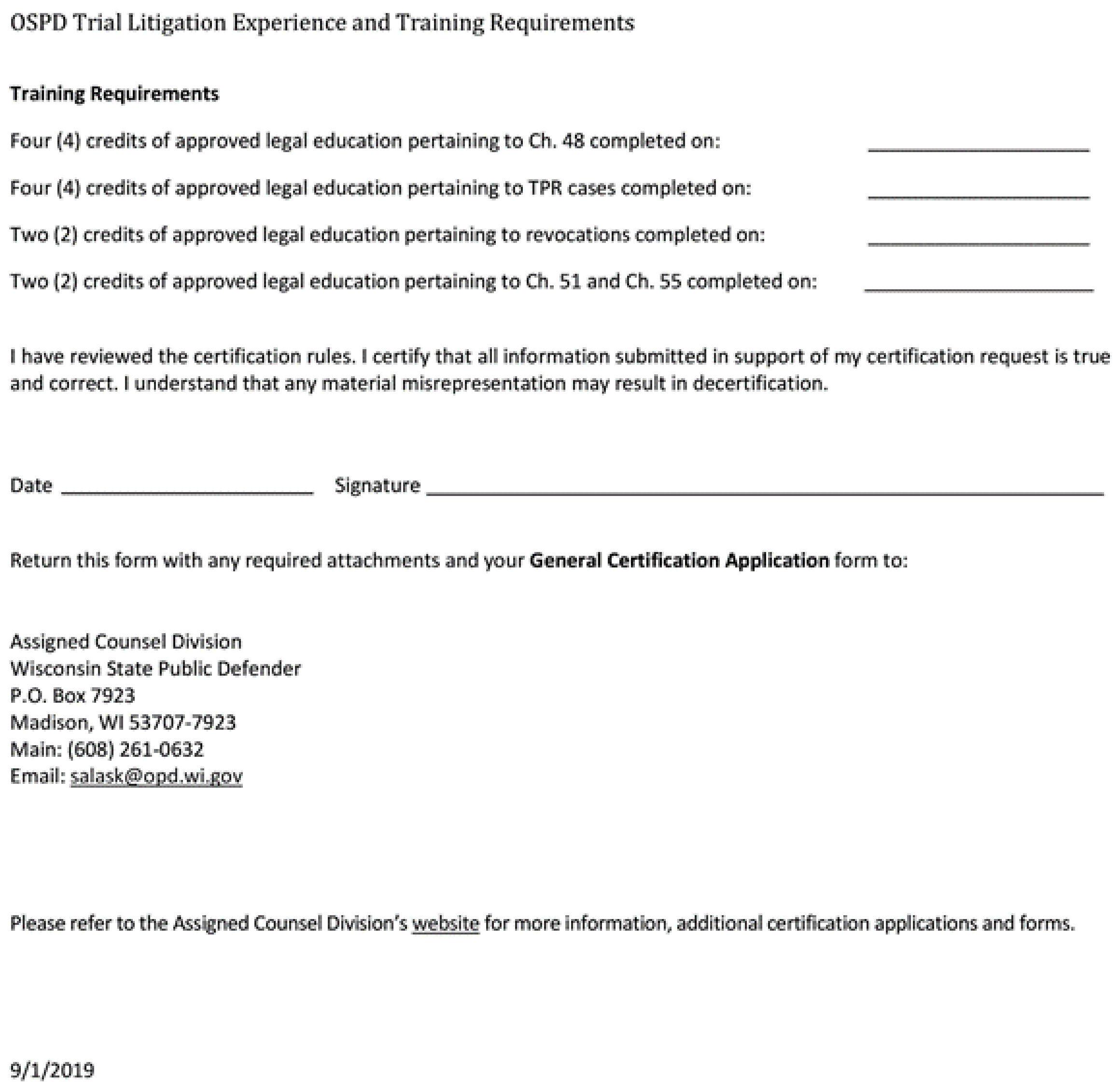
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date

If the court records are not in CCAP, please submit a copy of the court minute sheet or other documentation indicating the completion of the trial.

Completed Testimonial Hearings.

Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date
Client Name	Circuit Court Case No.	County	Date

If the court records are not in CCAP, please submit a copy of the court minute sheet or other documentation of the testimonial hearing.



OSPD Trial Litigation Experience and Training Requirements

Training Requirements

Four (4) credits of approved legal education pertaining to Ch. 48 completed on: ______________________

Four (4) credits of approved legal education pertaining to TPR cases completed on: ______________________

Two (2) credits of approved legal education pertaining to revocations completed on: ______________________

Two (2) credits of approved legal education pertaining to Ch. 51 and Ch. 55 completed on: ______________________

I have reviewed the certification rules. I certify that all information submitted in support of my certification request is true and correct. I understand that any material misrepresentation may result in decertification.

Date ________________________ Signature ____

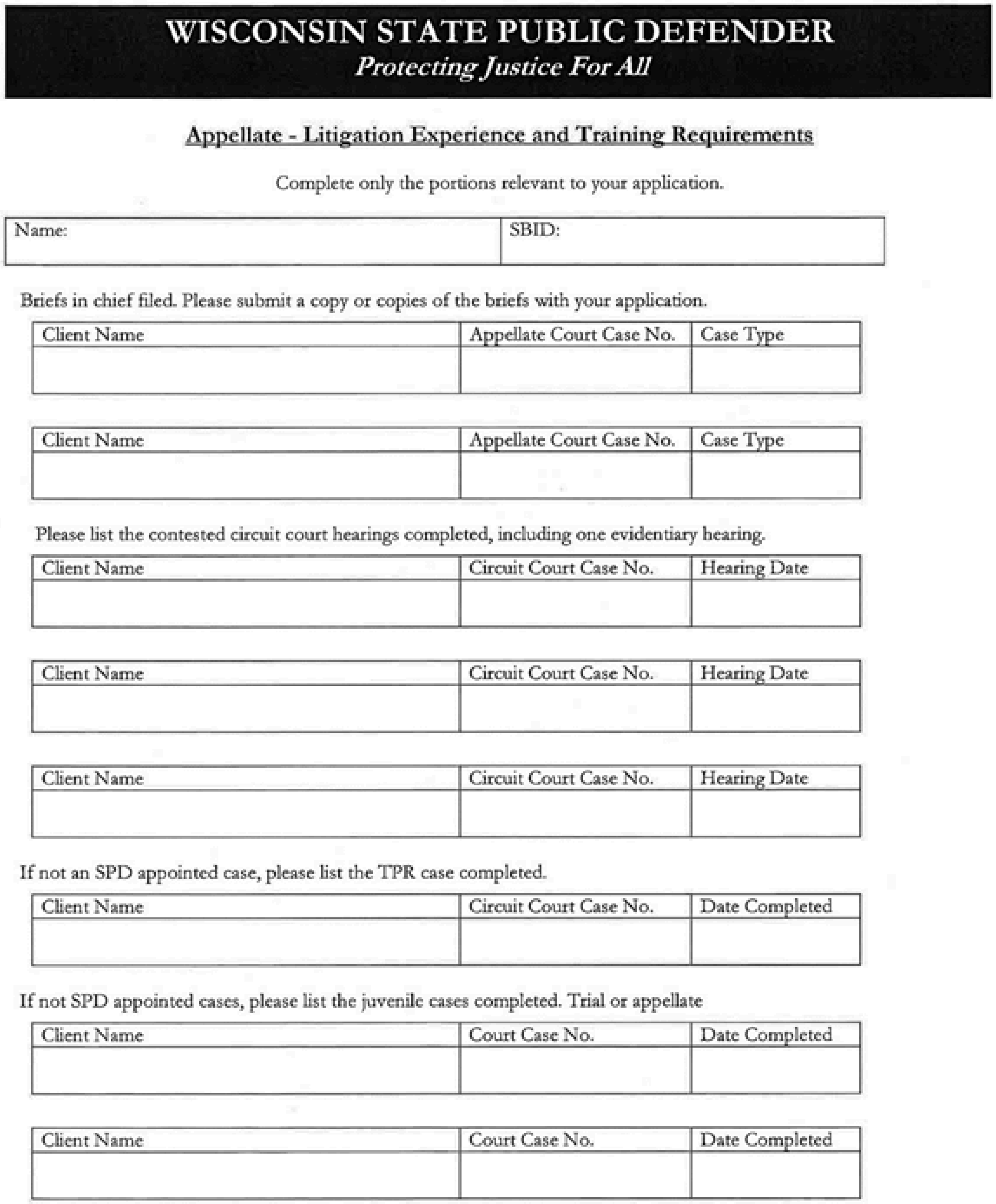
Return this form with any required attachments and your **General Certification Application** form to:

Assigned Counsel Division
Wisconsin State Public Defender
P.O. Box 7923
Madison, WI 53707-7923
Main: (608) 261-0632
Email: salask@opd.wi.gov

Please refer to the Assigned Counsel Division's website for more information, additional certification applications and forms.

9/1/2019

Form 10.26G Appellate—Litigation Experience and Training Requirements (CRM-0162)



WISCONSIN STATE PUBLIC DEFENDER

Protecting Justice For All

Appellate - Litigation Experience and Training Requirements

Complete only the portions relevant to your application.

Name:	SBID:

Briefs in chief filed. Please submit a copy or copies of the briefs with your application.

Client Name	Appellate Court Case No.	Case Type

Client Name	Appellate Court Case No.	Case Type

Please list the contested circuit court hearings completed, including one evidentiary hearing.

Client Name	Circuit Court Case No.	Hearing Date

Client Name	Circuit Court Case No.	Hearing Date

Client Name	Circuit Court Case No.	Hearing Date

If not an SPD appointed case, please list the TPR case completed.

Client Name	Circuit Court Case No.	Date Completed

If not SPD appointed cases, please list the juvenile cases completed. Trial or appellate

Client Name	Court Case No.	Date Completed

Client Name	Court Case No.	Date Completed

Client Name	Court Case No.	Date Completed

Client Name	Court Case No.	Date Completed

Client Name	Court Case No.	Date Completed

If not SPD appointed cases, please list the Ch. 51/55 cases completed. Trial or appellate.

Client Name	Circuit Court Case No.	Date Completed

Client Name	Circuit Court Case No.	Date Completed

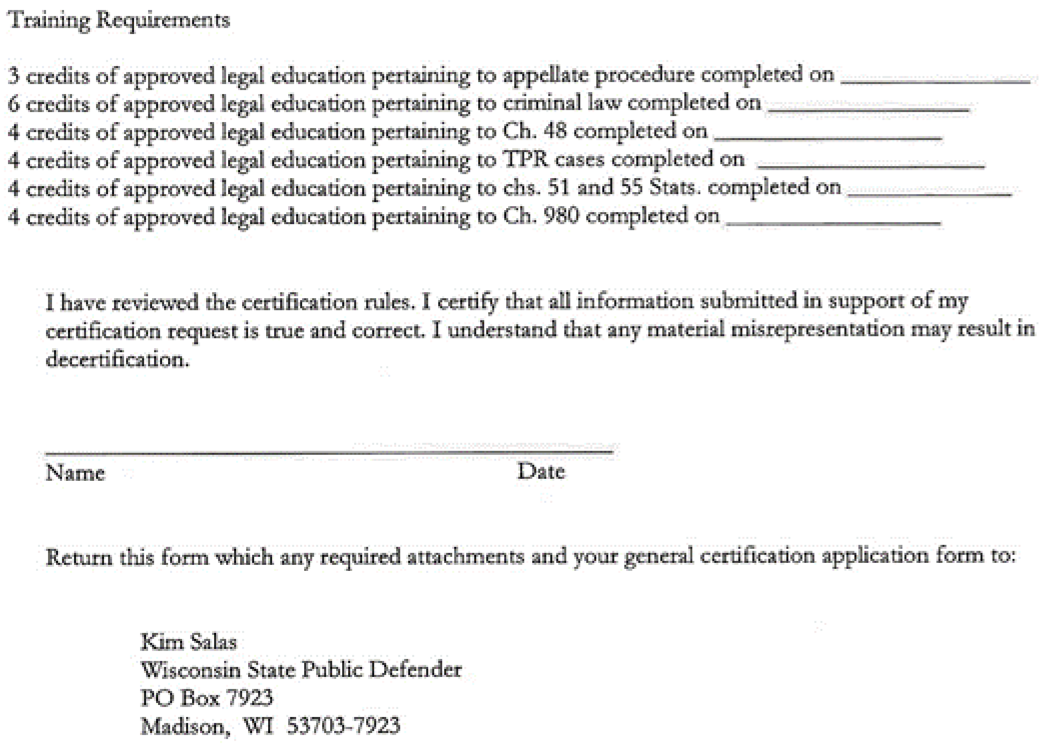
Client Name	Circuit Court Case No.	Date Completed

Client Name	Circuit Court Case No.	Date Completed

Client Name	Circuit Court Case No.	Date Completed

If not SPD appointed cases, please list the contested Ch. 980 case completed. Trial or appellate.

Client Name	Court Case No.	Date Completed



Training Requirements

3 credits of approved legal education pertaining to appellate procedure completed on ________________
6 credits of approved legal education pertaining to criminal law completed on ________________
4 credits of approved legal education pertaining to Ch. 48 completed on ________________
4 credits of approved legal education pertaining to TPR cases completed on ________________
4 credits of approved legal education pertaining to chs. 51 and 55 Stats. completed on ________________
4 credits of approved legal education pertaining to Ch. 980 completed on ________________

I have reviewed the certification rules. I certify that all information submitted in support of my certification request is true and correct. I understand that any material misrepresentation may result in decertification.

____
Name Date

Return this form which any required attachments and your general certification application form to:

Kim Salas
Wisconsin State Public Defender
PO Box 7923
Madison, WI 53703-7923

V. SPD Materials Generally Applicable to Private-Bar Appointments [§ 10.27]

Commentary and Instructions for Forms 10.27A–10.27E

Form 10.27A	Minimum Attorney Performance Standards for Appointed Private Bar Counsel (CRM-0163)
Form 10.27B	Minimum Attorney Performance Standards: Appellate Division (CRM-0164)
Form 10.27C	Core Principles of Juvenile Defense Practice (CRM-0165)
Form 10.27D	State Public Defender Request for Transcripts (CRM-0166)
Form 10.27E	SPD Trial Attorney Questionnaire (CRM-0167)

Private attorneys taking SPD cases should be familiar with the following materials, which are available from the SPD in hard copy, accessible at https://www.wispd.gov/_files/ugd/d7d26b_e9bc01edfdac43539f218eaf03fbc3e1.pdf, or both.

1. Policies and Instructions for Appointed Counsel

2. Order Appointing Counsel (OAC)

> ***Practice Tip.*** By various statutes, many fees and costs are reduced or waived for public defender cases. Counsel should be prepared to provide a copy of the OAC to show that a case is a public defender appointment. For example, a copy of the OAC should be included when asking the local sheriff's department to serve subpoenas, when filing a writ of certiorari in the circuit court, when requesting medical records, or when reserving a hotel room for the state rate.

3. Minimum Attorney Performance Standards (*infra* Forms 10.27A, 10.27B, 10.27C)

4. SPD Request for Transcripts (*infra* Form 10.27D)

5. SPD Trial Attorney Questionnaire (*infra* Form 10.27E)

The SPD policies relating to the acceptance of cases, the standards of representation, submission of bills, and the requirements for timekeeping are accessible online at https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024). This information establishes the boundaries of the contractual relationship with the agency and provides instructions for submitting vouchers to the SPD. The policies also advise the trial attorney of the duty to protect the client's right to appeal, if the client is interested in seeking postdispositional relief, by filing the notice of intent to pursue such relief (*see supra* Form 9.47A).

The SPD has an online billing system for work performed on SPD cases. The system is available to authorized users at https://pb.opd.wi.gov/pbaccess/login.aspx (last visited Aug. 22, 2024).

The SPD will not reimburse the attorney for time spent on the following:

1. Initial contact with the SPD on the case;

2. Completion of SPD billing and case-closing forms;

3. Appearance by an attorney other than the appointed attorney, except that an SPD-certified attorney may, with the prior approval of the local SPD office and with the client's consent, substitute at a noncritical appearance (i.e., no evidence taken, no testimony, no significant legal argument, and no disposition including plea bargaining) during the brief unavailability of the assigned attorney;

4. Uncompleted telephone calls; or

5. Appeal of SPD payment reductions.

The statutory rate of compensation to private attorneys for SPD cases is $100 per hour for time spent in or out of court (excluding travel) and $50 per hour for time spent in travel outside the county in which the attorney's principal office is located. Wis. Stat. § 977.08(4m). Bills should be submitted within six months after completion of the case. If a bill is not submitted within six months, the SPD need not pay the bill in a prompt manner. Wis. Admin. Code § PD 4.02. Vouchers submitted more than six years after completion of the case will not be paid. *See* Wis. Const. art. VIII, § 2.

As part of closing a case, the attorney must report dispositional information, which is entered into the SPD's computerized case management system. This statistical information is intended to aid the SPD in program management and assessment. A case may be closed, and the SPD billed for services, when any of the following conditions have been met:

1. There has been a sentencing, final judgment, or other final disposition. Representation at and after sentencing includes the following:
    a. Notice to the client of appellate rights *and*, if the client is interested in seeking postdispositional relief, filing of the notice of intent to pursue such relief (*see supra* Form 9.47A);
    b. Obtaining credit for jail time served; or
    c. Representation at any review hearing scheduled within 60 days after sentencing.

2. A bench warrant (capias) for the client's arrest, issued for a failure to appear, has been outstanding for 60 days.

3. Sixty days have passed after the entry of a deferred prosecution, deferred judgment, or hold-open agreement (and no request for further proceedings is pending).

4. If the case was a proceeding for revocation of supervision, the final hearing and any administrative appeal or appeal to the circuit court have been completed.

Competency issues are the exception to the general 60-day rule. In cases in which a client's competency is in question, the appointed attorney must not close the case, and should continue with representation, until there has been a determination of competency or a final determination that the client is not likely to become competent. *See* Wis. Stat. § 971.14(5), (6).

Although an attorney may have properly closed a case pursuant to SPD policies, ethics rules might require the attorney to represent the defendant in further circuit court proceedings until the court authorizes the attorney to withdraw. *See State v. Cummings*, 199 Wis. 2d 721, 748–49, 546 N.W.2d 406 (1996); *State v. Johnson*, 50 Wis. 2d 280, 283, 184 N.W.2d 107 (1971). Only the court, by granting a motion to withdraw, may relieve the attorney of this ethical obligation. *Cummings*, 199 Wis. 2d at 748–49. As a practical matter, however, many courts understand that the scope of representation, whether by appointed or retained counsel, does not generally include proceedings that were not discussed or contemplated when the representation began. For example, trial-level representation generally would not be understood to include representation in postconviction proceedings.

With the exception of motions for sentence credit under Wis. Stat. § 973.155 (*supra* Form 8.68A), trial attorneys are not responsible for any of the following as part of a trial-level appointment in a criminal case:

1. Motions to modify sentence or conditions of supervision (*see, e.g.*, *supra* Forms 9.50A, 9.52A);

2. Other postconviction motions, *see supra* ch. 9;

3. Appeal;

4. Motions for reexamination of clients found not guilty by reason of mental disease or defect under Wis. Stat. § 971.17, unless the hearing on the motion is scheduled within 60 days of sentencing;

5. Revocation proceedings; or

6. New trials following a successful appeal.

Form 10.27A, *infra*, titled Minimum Attorney Performance Standards for Appointed Private Bar Counsel, sets forth the basic standards for representation of SPD clients. It contains general standards, applicable in all cases, as well as practice standards for trial-level cases. Form 10.27B, *infra*, sets forth similar standards for representation in postconviction proceedings, and Form 10.27C, *infra*, sets forth similar standards for representation in juvenile proceedings.

Private-bar attorneys should use Form 10.27D, State Public Defender Request for Transcripts, *infra*, when ordering transcripts in SPD cases. SPD preapproval of transcript requests is required. In appellate cases, the SPD will generally order the applicable transcripts as part of the case assignment process. Further information and instructions regarding transcript requests are available at https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024).

Attorneys should complete Form 10.27E, SPD Trial Attorney Questionnaire, *infra*, for all SPD cases in which a notice of intent to seek postconviction relief is filed. The trial attorney should mail Form 10.27E, *infra*, to the SPD Appellate Intake Office (address provided on the form) and should include a date-stamped copy of the notice of intent as proof that the notice was filed on time.

Distribution

Form 10.27D

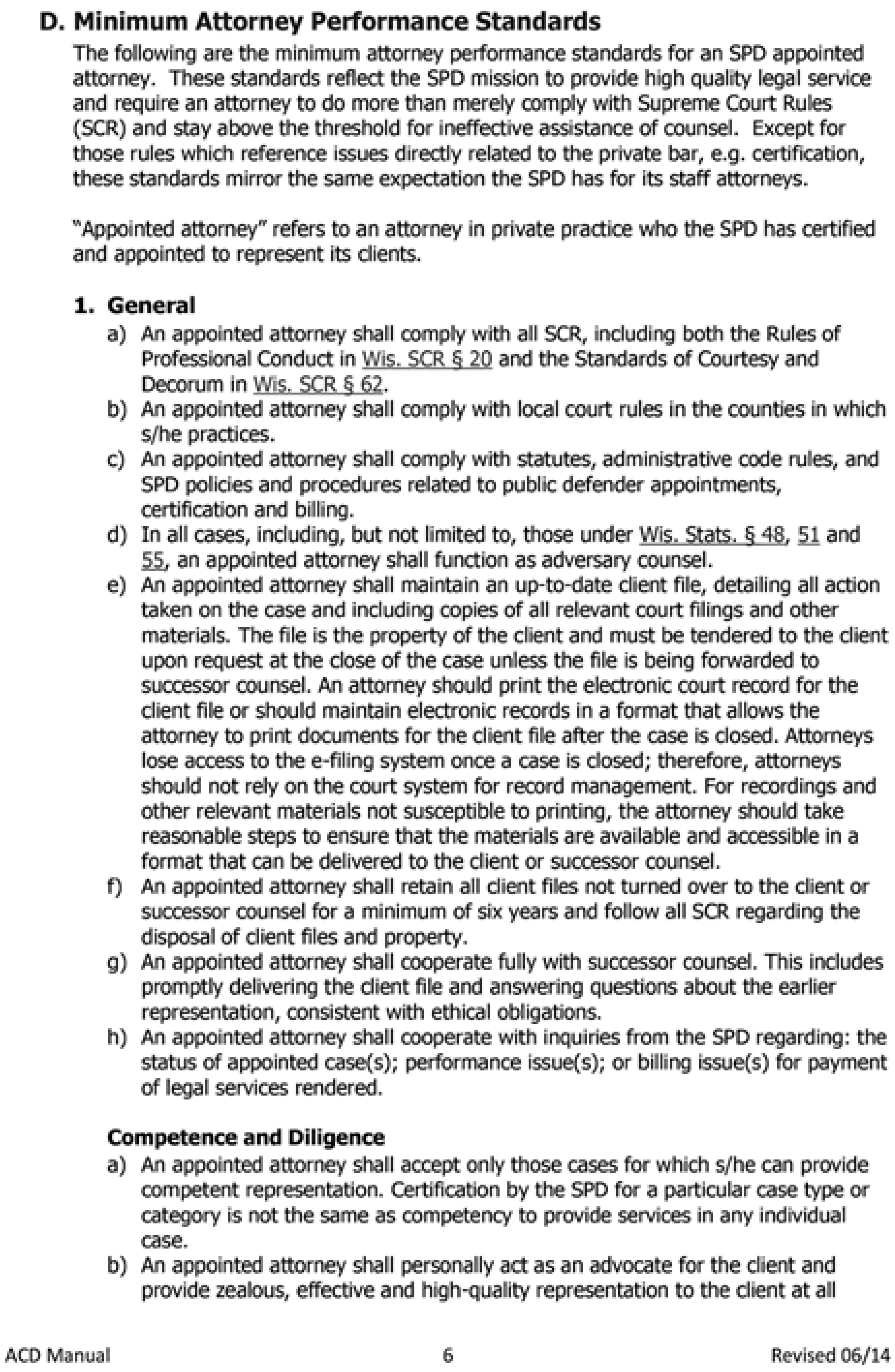
Original:	Court reporter
Copy:	Client file

Form 10.27E

Original:	SPD Appellate Intake
Copy:	Client file

Notes

Form 10.27A Minimum Attorney Performance Standards for Appointed Private Bar Counsel (CRM-0163)



D. Minimum Attorney Performance Standards

The following are the minimum attorney performance standards for an SPD appointed attorney. These standards reflect the SPD mission to provide high quality legal service and require an attorney to do more than merely comply with Supreme Court Rules (SCR) and stay above the threshold for ineffective assistance of counsel. Except for those rules which reference issues directly related to the private bar, e.g. certification, these standards mirror the same expectation the SPD has for its staff attorneys.

"Appointed attorney" refers to an attorney in private practice who the SPD has certified and appointed to represent its clients.

1. General

a) An appointed attorney shall comply with all SCR, including both the Rules of Professional Conduct in Wis. SCR § 20 and the Standards of Courtesy and Decorum in Wis. SCR § 62.

b) An appointed attorney shall comply with local court rules in the counties in which s/he practices.

c) An appointed attorney shall comply with statutes, administrative code rules, and SPD policies and procedures related to public defender appointments, certification and billing.

d) In all cases, including, but not limited to, those under Wis. Stats. § 48, 51 and 55, an appointed attorney shall function as adversary counsel.

e) An appointed attorney shall maintain an up-to-date client file, detailing all action taken on the case and including copies of all relevant court filings and other materials. The file is the property of the client and must be tendered to the client upon request at the close of the case unless the file is being forwarded to successor counsel. An attorney should print the electronic court record for the client file or should maintain electronic records in a format that allows the attorney to print documents for the client file after the case is closed. Attorneys lose access to the e-filing system once a case is closed; therefore, attorneys should not rely on the court system for record management. For recordings and other relevant materials not susceptible to printing, the attorney should take reasonable steps to ensure that the materials are available and accessible in a format that can be delivered to the client or successor counsel.

f) An appointed attorney shall retain all client files not turned over to the client or successor counsel for a minimum of six years and follow all SCR regarding the disposal of client files and property.

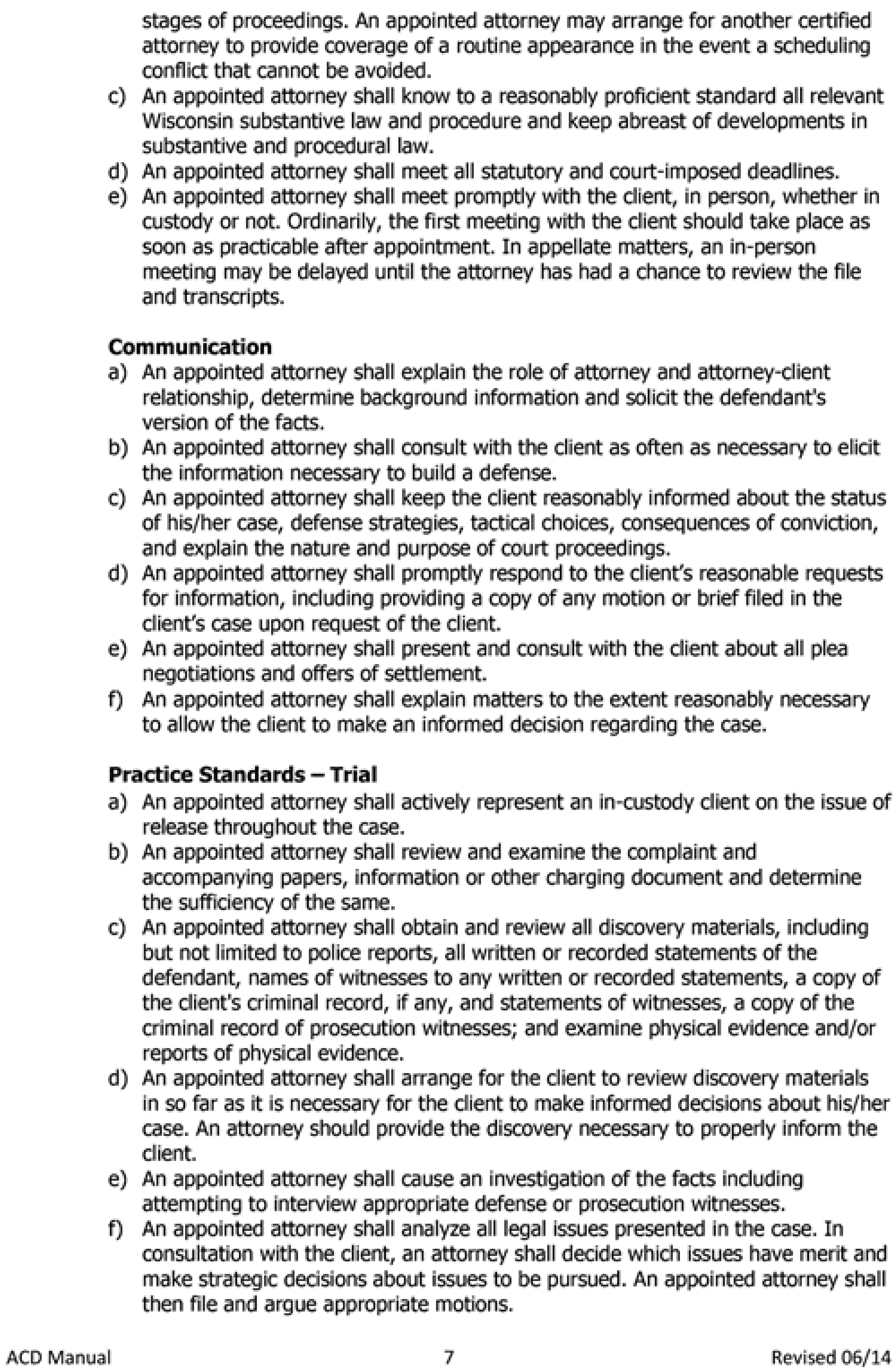
g) An appointed attorney shall cooperate fully with successor counsel. This includes promptly delivering the client file and answering questions about the earlier representation, consistent with ethical obligations.

h) An appointed attorney shall cooperate with inquiries from the SPD regarding: the status of appointed case(s); performance issue(s); or billing issue(s) for payment of legal services rendered.

Competence and Diligence

a) An appointed attorney shall accept only those cases for which s/he can provide competent representation. Certification by the SPD for a particular case type or category is not the same as competency to provide services in any individual case.

b) An appointed attorney shall personally act as an advocate for the client and provide zealous, effective and high-quality representation to the client at all



stages of proceedings. An appointed attorney may arrange for another certified attorney to provide coverage of a routine appearance in the event a scheduling conflict that cannot be avoided.

c) An appointed attorney shall know to a reasonably proficient standard all relevant Wisconsin substantive law and procedure and keep abreast of developments in substantive and procedural law.

d) An appointed attorney shall meet all statutory and court-imposed deadlines.

e) An appointed attorney shall meet promptly with the client, in person, whether in custody or not. Ordinarily, the first meeting with the client should take place as soon as practicable after appointment. In appellate matters, an in-person meeting may be delayed until the attorney has had a chance to review the file and transcripts.

Communication

a) An appointed attorney shall explain the role of attorney and attorney-client relationship, determine background information and solicit the defendant's version of the facts.

b) An appointed attorney shall consult with the client as often as necessary to elicit the information necessary to build a defense.

c) An appointed attorney shall keep the client reasonably informed about the status of his/her case, defense strategies, tactical choices, consequences of conviction, and explain the nature and purpose of court proceedings.

d) An appointed attorney shall promptly respond to the client's reasonable requests for information, including providing a copy of any motion or brief filed in the client's case upon request of the client.

e) An appointed attorney shall present and consult with the client about all plea negotiations and offers of settlement.

f) An appointed attorney shall explain matters to the extent reasonably necessary to allow the client to make an informed decision regarding the case.

Practice Standards – Trial

a) An appointed attorney shall actively represent an in-custody client on the issue of release throughout the case.

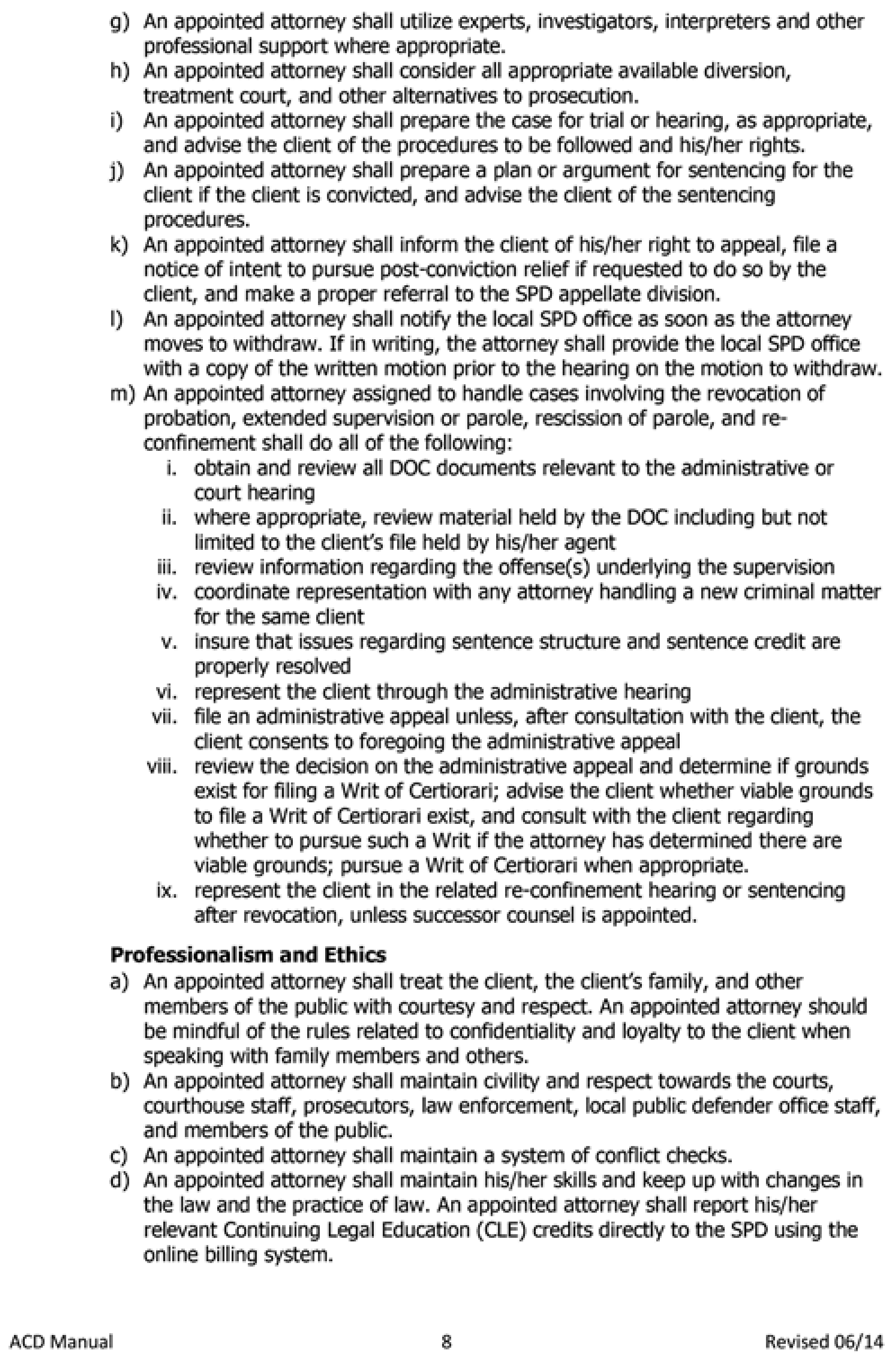
b) An appointed attorney shall review and examine the complaint and accompanying papers, information or other charging document and determine the sufficiency of the same.

c) An appointed attorney shall obtain and review all discovery materials, including but not limited to police reports, all written or recorded statements of the defendant, names of witnesses to any written or recorded statements, a copy of the client's criminal record, if any, and statements of witnesses, a copy of the criminal record of prosecution witnesses; and examine physical evidence and/or reports of physical evidence.

d) An appointed attorney shall arrange for the client to review discovery materials in so far as it is necessary for the client to make informed decisions about his/her case. An attorney should provide the discovery necessary to properly inform the client.

e) An appointed attorney shall cause an investigation of the facts including attempting to interview appropriate defense or prosecution witnesses.

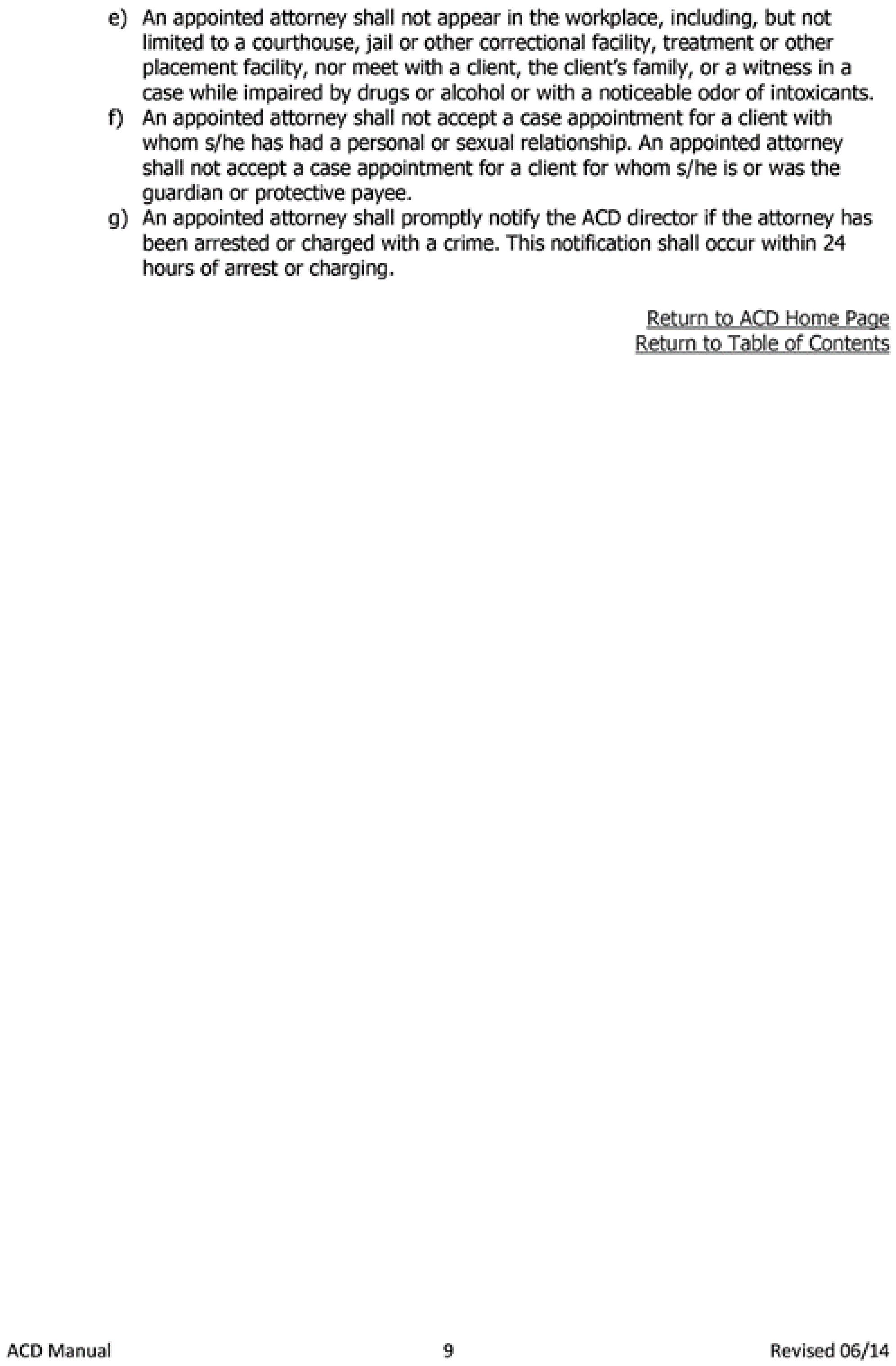
f) An appointed attorney shall analyze all legal issues presented in the case. In consultation with the client, an attorney shall decide which issues have merit and make strategic decisions about issues to be pursued. An appointed attorney shall then file and argue appropriate motions.



g) An appointed attorney shall utilize experts, investigators, interpreters and other professional support where appropriate.
h) An appointed attorney shall consider all appropriate available diversion, treatment court, and other alternatives to prosecution.
i) An appointed attorney shall prepare the case for trial or hearing, as appropriate, and advise the client of the procedures to be followed and his/her rights.
j) An appointed attorney shall prepare a plan or argument for sentencing for the client if the client is convicted, and advise the client of the sentencing procedures.
k) An appointed attorney shall inform the client of his/her right to appeal, file a notice of intent to pursue post-conviction relief if requested to do so by the client, and make a proper referral to the SPD appellate division.
l) An appointed attorney shall notify the local SPD office as soon as the attorney moves to withdraw. If in writing, the attorney shall provide the local SPD office with a copy of the written motion prior to the hearing on the motion to withdraw.
m) An appointed attorney assigned to handle cases involving the revocation of probation, extended supervision or parole, rescission of parole, and re-confinement shall do all of the following:
    i. obtain and review all DOC documents relevant to the administrative or court hearing
    ii. where appropriate, review material held by the DOC including but not limited to the client's file held by his/her agent
    iii. review information regarding the offense(s) underlying the supervision
    iv. coordinate representation with any attorney handling a new criminal matter for the same client
    v. insure that issues regarding sentence structure and sentence credit are properly resolved
    vi. represent the client through the administrative hearing
    vii. file an administrative appeal unless, after consultation with the client, the client consents to foregoing the administrative appeal
    viii. review the decision on the administrative appeal and determine if grounds exist for filing a Writ of Certiorari; advise the client whether viable grounds to file a Writ of Certiorari exist, and consult with the client regarding whether to pursue such a Writ if the attorney has determined there are viable grounds; pursue a Writ of Certiorari when appropriate.
    ix. represent the client in the related re-confinement hearing or sentencing after revocation, unless successor counsel is appointed.

Professionalism and Ethics

a) An appointed attorney shall treat the client, the client's family, and other members of the public with courtesy and respect. An appointed attorney should be mindful of the rules related to confidentiality and loyalty to the client when speaking with family members and others.
b) An appointed attorney shall maintain civility and respect towards the courts, courthouse staff, prosecutors, law enforcement, local public defender office staff, and members of the public.
c) An appointed attorney shall maintain a system of conflict checks.
d) An appointed attorney shall maintain his/her skills and keep up with changes in the law and the practice of law. An appointed attorney shall report his/her relevant Continuing Legal Education (CLE) credits directly to the SPD using the online billing system.



e) An appointed attorney shall not appear in the workplace, including, but not limited to a courthouse, jail or other correctional facility, treatment or other placement facility, nor meet with a client, the client's family, or a witness in a case while impaired by drugs or alcohol or with a noticeable odor of intoxicants.
f) An appointed attorney shall not accept a case appointment for a client with whom s/he has had a personal or sexual relationship. An appointed attorney shall not accept a case appointment for a client for whom s/he is or was the guardian or protective payee.
g) An appointed attorney shall promptly notify the ACD director if the attorney has been arrested or charged with a crime. This notification shall occur within 24 hours of arrest or charging.

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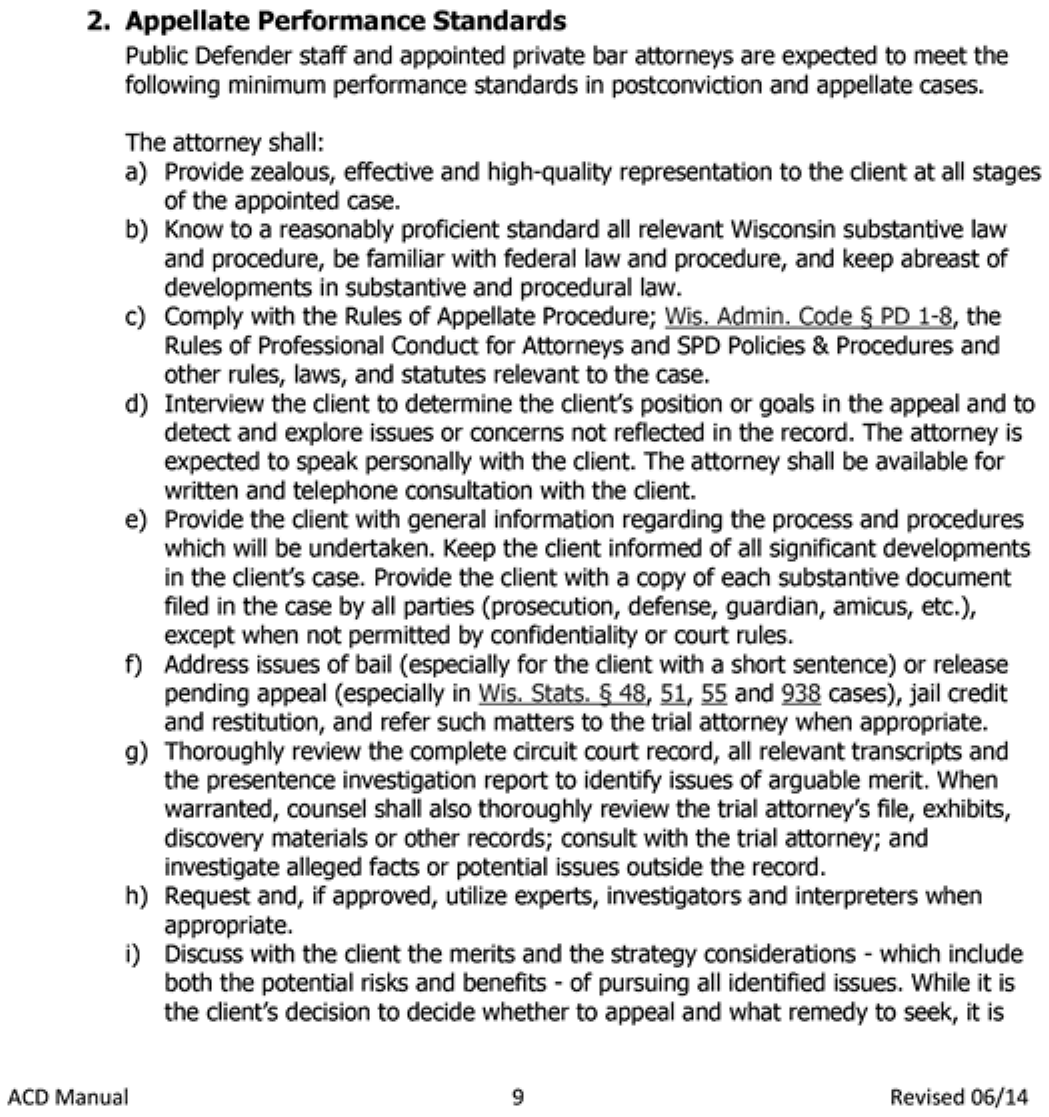
Form 10.27B Minimum Attorney Performance Standards: Appellate Division (CRM-0164)



2. Appellate Performance Standards

Public Defender staff and appointed private bar attorneys are expected to meet the following minimum performance standards in postconviction and appellate cases.

The attorney shall:

a) Provide zealous, effective and high-quality representation to the client at all stages of the appointed case.

b) Know to a reasonably proficient standard all relevant Wisconsin substantive law and procedure, be familiar with federal law and procedure, and keep abreast of developments in substantive and procedural law.

c) Comply with the Rules of Appellate Procedure; Wis. Admin. Code § PD 1-8, the Rules of Professional Conduct for Attorneys and SPD Policies & Procedures and other rules, laws, and statutes relevant to the case.

d) Interview the client to determine the client's position or goals in the appeal and to detect and explore issues or concerns not reflected in the record. The attorney is expected to speak personally with the client. The attorney shall be available for written and telephone consultation with the client.

e) Provide the client with general information regarding the process and procedures which will be undertaken. Keep the client informed of all significant developments in the client's case. Provide the client with a copy of each substantive document filed in the case by all parties (prosecution, defense, guardian, amicus, etc.), except when not permitted by confidentiality or court rules.

f) Address issues of bail (especially for the client with a short sentence) or release pending appeal (especially in Wis. Stats. § 48, 51, 55 and 938 cases), jail credit and restitution, and refer such matters to the trial attorney when appropriate.

g) Thoroughly review the complete circuit court record, all relevant transcripts and the presentence investigation report to identify issues of arguable merit. When warranted, counsel shall also thoroughly review the trial attorney's file, exhibits, discovery materials or other records; consult with the trial attorney; and investigate alleged facts or potential issues outside the record.

h) Request and, if approved, utilize experts, investigators and interpreters when appropriate.

i) Discuss with the client the merits and the strategy considerations - which include both the potential risks and benefits - of pursuing all identified issues. While it is the client's decision to decide whether to appeal and what remedy to seek, it is

counsel's obligation to determine which issues have merit and the manner in which they will be pursued. Counsel, consistent with Jones v. Barnes, 463 U.S. 745 (1983), need not raise every non-frivolous argument and may sift and winnow out weaker issues for strategic advocacy purposes. Counsel must also consider that counsel's failure to raise an issue on direct appeal may prevent the client from raising the issue in a subsequent Wis. Stat. § 974.06 collateral review proceeding, absent sufficient reason, consistent with State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). If the client insists on pursuing a meritless issue or one that the attorney has winnowed out consistent with Jones v. Barnes, the attorney shall fully inform the client of the options (to proceed as counsel recommends, pro se, or with privately retained counsel) and the consequences of each option.

j) If the attorney is of the opinion that a case contains no issue of arguable merit, communicate that decision to the client before filing a no-merit notice of appeal or no-merit brief. The attorney must inform the client of any right to a no merit report under the statutes and laws of this state. The attorney must inform the client of the client's rights and attorney's obligations under Wis. Stats. § 809.107 (5m) or 809.32. The attorney must inform the client, consistent with State ex rel. Flores v. State, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), of the client's options (to have counsel file the no-merit report, to discharge counsel and proceed pro se or with privately retained counsel, or to have counsel close the case with no court action) and the possible consequences of each option, including the disadvantages of proceeding without counsel. The attorney must document this exchange and send a letter to the client confirming the client's choice.

k) When filing any motion, conform to the applicable local court rules and practice procedures. Postconviction or post-judgment motions should contain carefully drafted nonconclusory factual allegations and appropriate citations to the record and law warranting relief. It is the attorney's responsibility to seek extensions for the circuit court to decide motions where appropriate. The attorney shall ensure entry of a written order disposing of the motion.

l) When filing a brief, conform to the applicable rules of the court in which the brief is being filed. All briefs shall have a professional, neat appearance free of typographical errors or misspellings. Briefs must adequately and accurately state the facts of the case and contain complete and accurate record citations. Briefs shall make appropriate use of legal authority referenced by a consistent method of citation that conforms to court rules or, where no rule exists, the Harvard Citator. Briefs shall utilize federal and foreign jurisdiction cases and non-case reference materials such as law reviews, treatises, and scientific works where appropriate.

m) Inform the client of his or her rights and the attorney's obligations in regard to proceeding to the next appellate court level and take steps to ensure that such rights as fall within the scope of the attorney's appointment are not procedurally defaulted.

n) Respond in a prompt and forthright manner to all inquiries and requests for information from the client, the parties, opposing counsel, the SPD, the court, the clerk of court, and any successor attorney.

o) Maintain a complete up-to-date case file for every case. The file shall contain, at minimum, all correspondence, including a closing letter or memo; copies of all documents filed; proof of service for all transcripts, court records or other papers that trigger a time limit; copies of all court orders or decisions; notations in summary form as to all action taken, advice given, and telephone and in-person communications; a record of documents provided to the client; and a case activity log or voucher that documents the attorney's time spent on the case.

p) At the termination of representation, inform the client in writing of the reason for closing the file and any options for further action the client may have on direct appeal. If counsel cannot contact the client via mail, the closing information and the reason why the closing letter was not sent should be recorded in a memo to the file.

q) When requested at the termination of representation, promptly deliver to the client or the client's successor attorney the full contents of the client's case file. Note that, pursuant to Wis. Stats. § 972.15 (4) and (4m), the attorney may forward the attorney's copy of the presentence investigation report to a successor attorney, but may not forward it to the client without prior authorization from the circuit court.

r) Promptly close the file upon completion of representation and submit case closing documents. Retain the client file consistent with the Rules of Professional Conduct for Attorneys and SPD Policy.

s) Cooperate with any successor attorney in the case.

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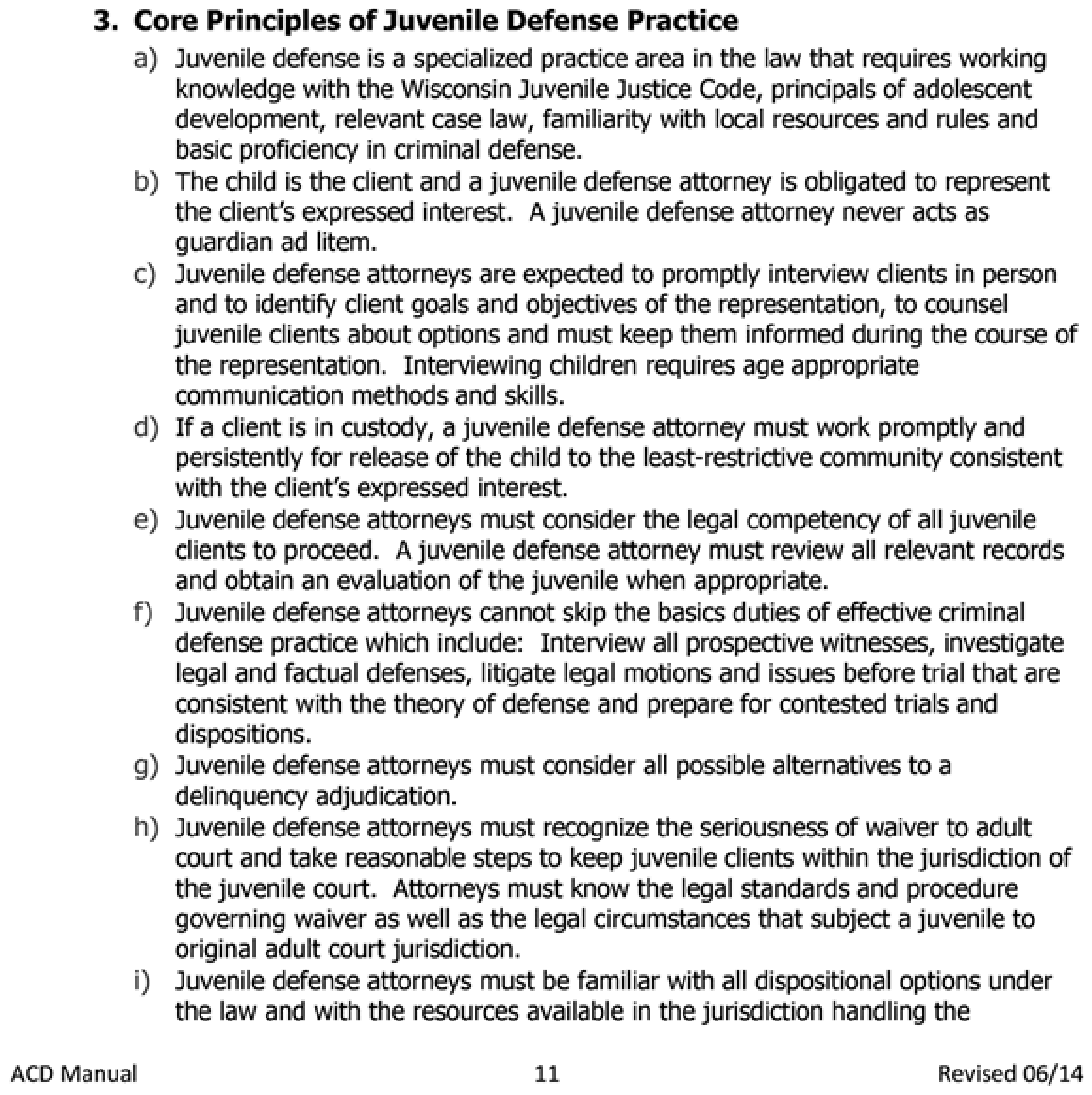
Form 10.27C Core Principles of Juvenile Defense Practice (CRM-0165)



3. Core Principles of Juvenile Defense Practice

a) Juvenile defense is a specialized practice area in the law that requires working knowledge with the Wisconsin Juvenile Justice Code, principals of adolescent development, relevant case law, familiarity with local resources and rules and basic proficiency in criminal defense.

b) The child is the client and a juvenile defense attorney is obligated to represent the client's expressed interest. A juvenile defense attorney never acts as guardian ad litem.

c) Juvenile defense attorneys are expected to promptly interview clients in person and to identify client goals and objectives of the representation, to counsel juvenile clients about options and must keep them informed during the course of the representation. Interviewing children requires age appropriate communication methods and skills.

d) If a client is in custody, a juvenile defense attorney must work promptly and persistently for release of the child to the least-restrictive community consistent with the client's expressed interest.

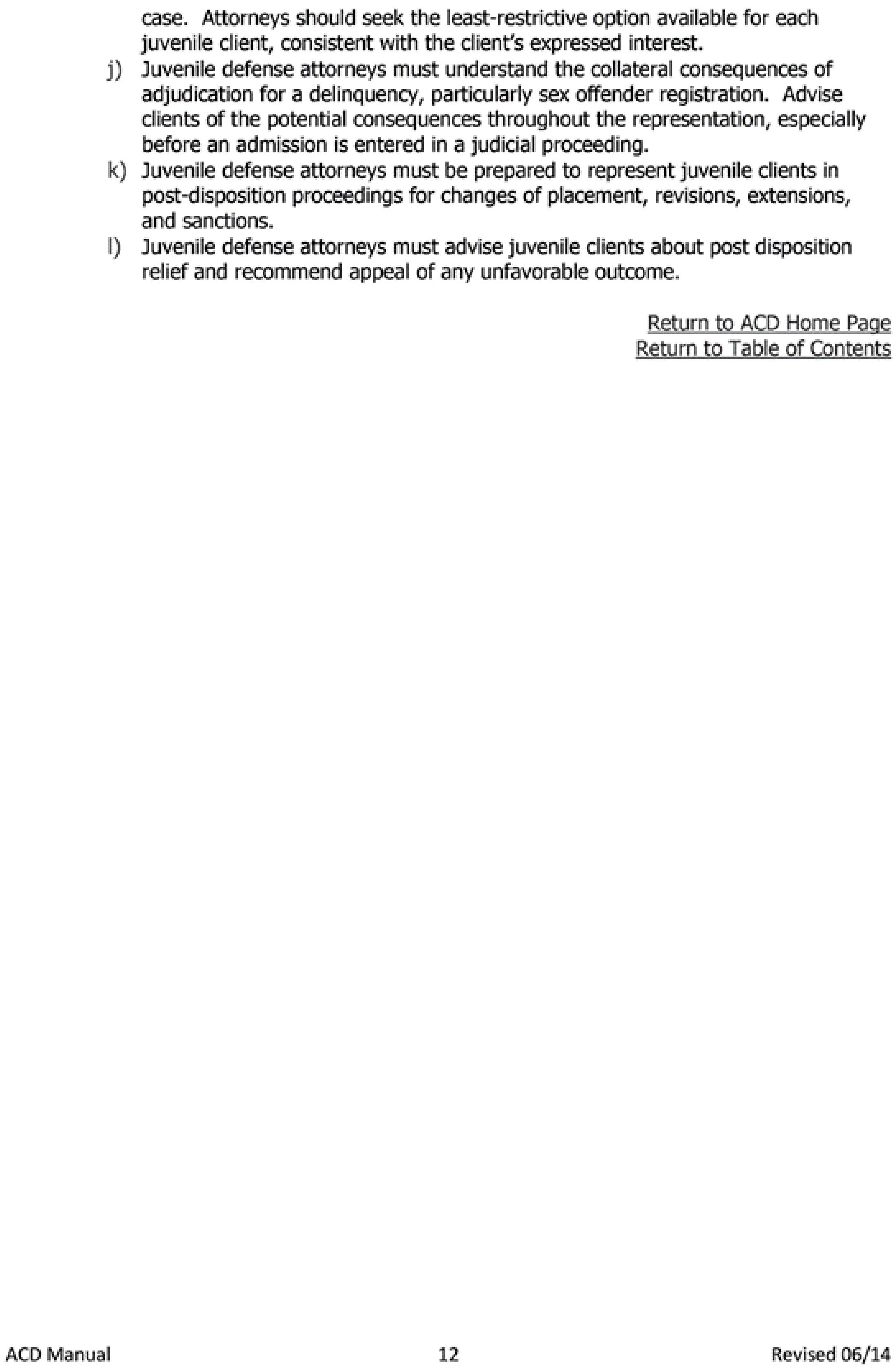
e) Juvenile defense attorneys must consider the legal competency of all juvenile clients to proceed. A juvenile defense attorney must review all relevant records and obtain an evaluation of the juvenile when appropriate.

f) Juvenile defense attorneys cannot skip the basics duties of effective criminal defense practice which include: Interview all prospective witnesses, investigate legal and factual defenses, litigate legal motions and issues before trial that are consistent with the theory of defense and prepare for contested trials and dispositions.

g) Juvenile defense attorneys must consider all possible alternatives to a delinquency adjudication.

h) Juvenile defense attorneys must recognize the seriousness of waiver to adult court and take reasonable steps to keep juvenile clients within the jurisdiction of the juvenile court. Attorneys must know the legal standards and procedure governing waiver as well as the legal circumstances that subject a juvenile to original adult court jurisdiction.

i) Juvenile defense attorneys must be familiar with all dispositional options under the law and with the resources available in the jurisdiction handling the



case. Attorneys should seek the least-restrictive option available for each juvenile client, consistent with the client's expressed interest.

j) Juvenile defense attorneys must understand the collateral consequences of adjudication for a delinquency, particularly sex offender registration. Advise clients of the potential consequences throughout the representation, especially before an admission is entered in a judicial proceeding.
k) Juvenile defense attorneys must be prepared to represent juvenile clients in post-disposition proceedings for changes of placement, revisions, extensions, and sanctions.
l) Juvenile defense attorneys must advise juvenile clients about post disposition relief and recommend appeal of any unfavorable outcome.

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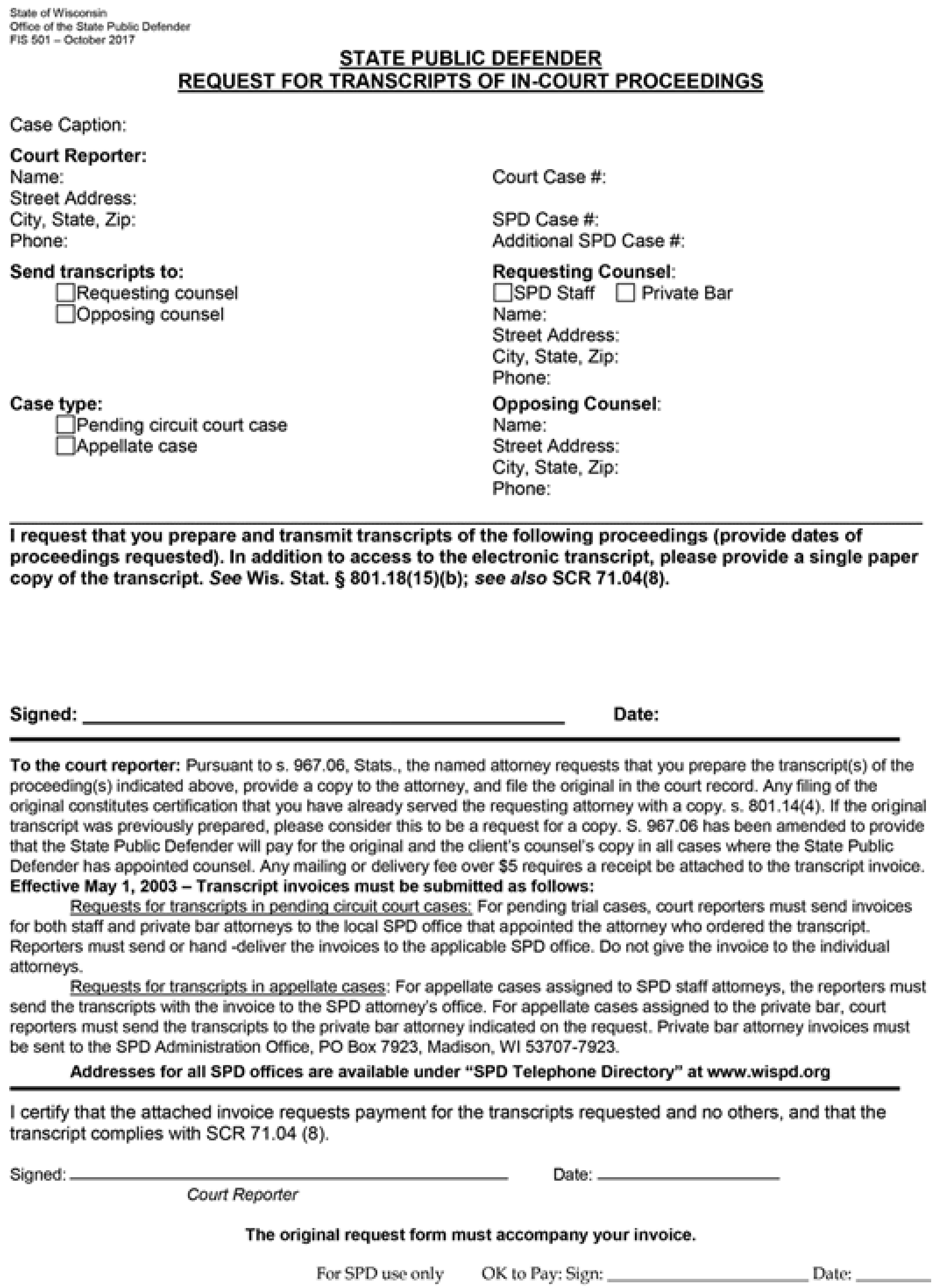
Form 10.27D State Public Defender Request for Transcripts (CRM-0166)



State of Wisconsin
Office of the State Public Defender
FIS 501 – October 2017

STATE PUBLIC DEFENDER
REQUEST FOR TRANSCRIPTS OF IN-COURT PROCEEDINGS

Case Caption:

Court Reporter:
Name:
Street Address:
City, State, Zip:
Phone:

Court Case #:

SPD Case #:
Additional SPD Case #:

Send transcripts to:
☐ Requesting counsel
☐ Opposing counsel

Requesting Counsel:
☐ SPD Staff ☐ Private Bar
Name:
Street Address:
City, State, Zip:
Phone:

Case type:
☐ Pending circuit court case
☐ Appellate case

Opposing Counsel:
Name:
Street Address:
City, State, Zip:
Phone:

I request that you prepare and transmit transcripts of the following proceedings (provide dates of proceedings requested). In addition to access to the electronic transcript, please provide a single paper copy of the transcript. *See* Wis. Stat. § 801.18(15)(b); *see also* SCR 71.04(8).

Signed: ____________________ **Date:**

To the court reporter: Pursuant to s. 967.06, Stats., the named attorney requests that you prepare the transcript(s) of the proceeding(s) indicated above, provide a copy to the attorney, and file the original in the court record. Any filing of the original constitutes certification that you have already served the requesting attorney with a copy. s. 801.14(4). If the original transcript was previously prepared, please consider this to be a request for a copy. S. 967.06 has been amended to provide that the State Public Defender will pay for the original and the client's counsel's copy in all cases where the State Public Defender has appointed counsel. Any mailing or delivery fee over $5 requires a receipt be attached to the transcript invoice.

Effective May 1, 2003 – Transcript invoices must be submitted as follows:

Requests for transcripts in pending circuit court cases: For pending trial cases, court reporters must send invoices for both staff and private bar attorneys to the local SPD office that appointed the attorney who ordered the transcript. Reporters must send or hand -deliver the invoices to the applicable SPD office. Do not give the invoice to the individual attorneys.

Requests for transcripts in appellate cases: For appellate cases assigned to SPD staff attorneys, the reporters must send the transcripts with the invoice to the SPD attorney's office. For appellate cases assigned to the private bar, court reporters must send the transcripts to the private bar attorney indicated on the request. Private bar attorney invoices must be sent to the SPD Administration Office, PO Box 7923, Madison, WI 53707-7923.

Addresses for all SPD offices are available under "SPD Telephone Directory" at www.wispd.org

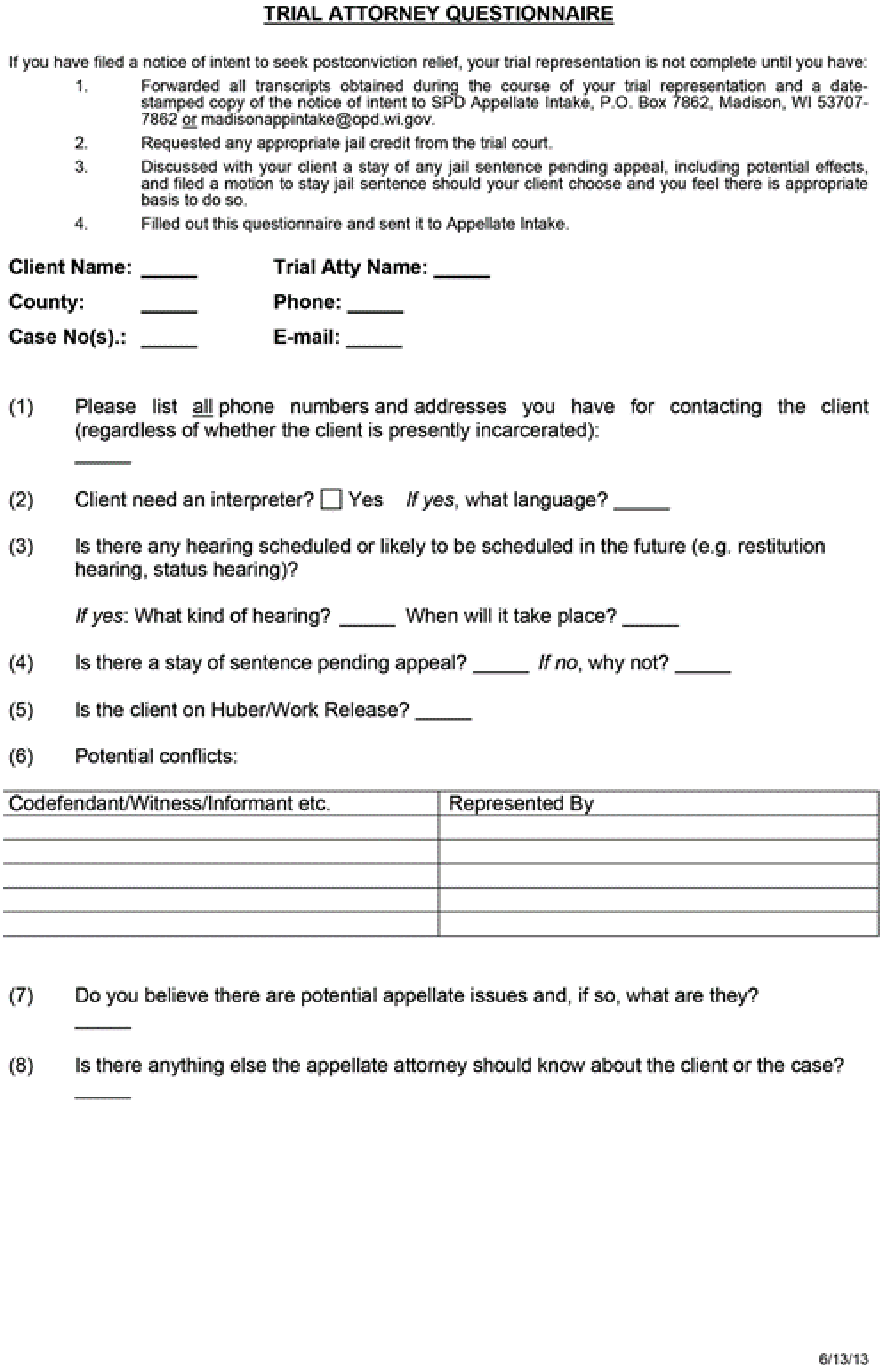
I certify that the attached invoice requests payment for the transcripts requested and no others, and that the transcript complies with SCR 71.04 (8).

Signed: ____________________ Date: ____________
Court Reporter

The original request form must accompany your invoice.

For SPD use only OK to Pay: Sign: ____________ Date: ________

Form 10.27E SPD Trial Attorney Questionnaire (CRM-0167)



TRIAL ATTORNEY QUESTIONNAIRE

If you have filed a notice of intent to seek postconviction relief, your trial representation is not complete until you have:

1. Forwarded all transcripts obtained during the course of your trial representation and a date-stamped copy of the notice of intent to SPD Appellate Intake, P.O. Box 7862, Madison, WI 53707-7862 or madisonappintake@opd.wi.gov.
2. Requested any appropriate jail credit from the trial court.
3. Discussed with your client a stay of any jail sentence pending appeal, including potential effects, and filed a motion to stay jail sentence should your client choose and you feel there is appropriate basis to do so.
4. Filled out this questionnaire and sent it to Appellate Intake.

Client Name: _____ **Trial Atty Name:** _____

County: _____ **Phone:** _____

Case No(s).: _____ **E-mail:** _____

(1) Please list all phone numbers and addresses you have for contacting the client (regardless of whether the client is presently incarcerated):

_____

(2) Client need an interpreter? ☐ Yes *If yes*, what language? _____

(3) Is there any hearing scheduled or likely to be scheduled in the future (e.g. restitution hearing, status hearing)?

If yes: What kind of hearing? _____ When will it take place? _____

(4) Is there a stay of sentence pending appeal? _____ *If no*, why not? _____

(5) Is the client on Huber/Work Release? _____

(6) Potential conflicts:

Codefendant/Witness/Informant etc.	Represented By

(7) Do you believe there are potential appellate issues and, if so, what are they?

_____

(8) Is there anything else the appellate attorney should know about the client or the case?

_____

6/13/13

VI. Hiring Experts or Investigators in SPD Cases [§ 10.28]

Commentary and Instructions for Forms 10.28A–10.28C

Form 10.28A	Motion for Ex Parte Hearing (CRM-0168)
Form 10.28B	Motion for Expert Funding (CRM-0169)
Form 10.28C	Sample Brief in Support of Motion for Expert Funding (CRM-0170)

The SPD has been granted the authority, and the agency has limited funds available, to hire investigators and experts for private attorneys assigned to its cases. *See* Wis. Admin. Code § PD 2.12. The private attorney must obtain prior approval for these expenses. *See* Wis. Stat. § 977.05(4r). Attorneys appointed from the private bar should use the "Expense Authorization" link in the online billing program to request approval to hire an expert or investigator.

Attorneys should anticipate the need for experts or investigators and submit requests as early in the case as possible. All requests should be submitted through the e-opd electronic system. Turnaround time for approvals is less than one week. In an emergency, approval may be granted by phone or email, after which the attorney must follow up with an online written request. The SPD ACD in Madison handles approval for all private-bar requests for experts and investigators.

The attorney is responsible for locating the needed investigator or expert and for obtaining the investigator's or expert's agreement to accept the work at SPD-approved rates. The name, address, and telephone number of the investigator or expert must be included on the request form. If the attorney is having difficulty locating an investigator or expert, the attorney can contact the nearest SPD office. Each local office has some experience with private investigators and experts who will accept SPD cases. An attorney can also contact the ACD director or program manager for assistance finding an expert.

The requesting attorney must provide an estimate of the number of hours the investigator or expert will need to complete the work, or the attorney may advise the SPD of a fixed amount that the investigator or expert will accept to complete the described services. An advance telephone call to the investigator or expert, giving a brief explanation of the case and the work involved, will generally suffice to obtain an estimate of the cost of the work. The attorney must also justify the use of an investigator or expert. Form 10.28A, *infra*, provides guidance in evaluating the need for the investigator or expert.

Investigators are approved more frequently than experts. For investigators, the current SPD rate is $50 per hour, plus reasonable expenses. Reasonable expenses include mileage, parking, photocopying, film developing, and, in some instances, meals and lodging if necessary. Investigators must be licensed unless exempt. *See* Wis. Stat. § 440.26. In evaluating requests for investigators, the SPD considers the nature of the investigation and the number of hours requested. Investigators will not be approved to perform duties that are properly the attorney's, such as interviewing the client, or duties that can be more economically performed by other individuals, such as service of subpoenas. *See* Wis. Stat. §§ 59.27(4) (sheriff's duty to serve subpoenas), 885.10 (public defender eligibility is proof of defendant's financial inability to procure witness attendance).

> ***Practice Tip.*** A good rule of thumb in estimating the number of hours an investigation may take is to allow one to two hours for each witness to be interviewed.
>
> While the SPD has limited funding available for experts, every effort will be made to grant reasonable requests. Many experts, such as psychologists, psychiatrists, and physicians, will quote an hourly rate and estimate the number of hours required to perform the needed services. Their hourly

> rates often exceed the rate that the SPD is willing to pay; in such instances, the lawyer will have to negotiate with the expert for a reduced, SPD-approved, rate. A fixed fee for the expert's services on the case is another option. Necessary travel, meals, and lodging may be paid, consistent with state guidelines.

If the expert or investigative services are approved for SPD funding, the attorney may seek interim payment of these fees before the end of the case. If the expert or investigator has completed the work, the SPD generally approves the interim-billing procedure. Payments for expert and investigative services are made to the attorney, and it is the attorney's responsibility to pay the expert or investigator. This method of payment is inconvenient for the private attorney because it requires the attorney to file a supplemental IRS 1099 form for passed-through income. The SPD is not authorized by statute, however, to pay experts or investigators directly for work done on cases.

Some experts are more properly appointed and paid by the court than by the public defender. *See, e.g.*, Wis. Stat. §§ 971.14(2) (court-appointed experts relating to competency), 165.79 (forensic experts from state crime laboratory).

The SPD funds some experts at a threshold level. The concept of *threshold funding* is based on the approach taken in cases from other jurisdictions implementing the holding of *Ake v. Oklahoma*, 470 U.S. 68 (1985). In that case, the U.S. Supreme Court held that, when an indigent defendant

> demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83.

The threshold money is used to hire an expert to evaluate whether there is a need for that expert in the case. If the SPD denies a request for additional funding, the attorney may have a basis to move the court to appoint an expert. *See id.*; *see also* Wis. Stat. § 971.14(1r)(a), (2)(a); *Ruff v. State*, 65 Wis. 2d 713, 223 N.W.2d 446 (1974); *Watson v. State*, 64 Wis. 2d 264, 219 N.W.2d 398 (1974); *State ex rel. Dressler v. Racine Cnty. Circuit Ct.*, 163 Wis. 2d 622, 472 N.W.2d 532 (Ct. App. 1991). The attorney will generally have more success, however, convincing the SPD that the proposed expert expenditure is necessary.

Additional information about requests for experts and about working with experts is available at the SPD website, https://www.wispd.gov/assigned-counsel-division (last visited Aug. 22, 2024). If the attorney moves for appointment of an expert at county expense after having been denied funding by the SPD, the attorney should review the case law regarding allocations of costs between the SPD and the county. *See, e.g.*, Wis. Stat. § 977.05(4r); *Polk Cnty. v. State Pub. Def.*, 179 Wis. 2d 312, 507 N.W.2d 576 (Ct. App. 1993), *aff'd*, 188 Wis. 2d 665, 524 N.W.2d 389 (1994); *Brown Cnty. Dep't of Soc. Servs. v. Lydia E.C. (In the Int. of Eileen K.C.)*, 172 Wis. 2d 512, 493 N.W.2d 264 (Ct. App. 1992). To succeed on a motion for appointment of an expert, the attorney must identify the relevant issues and facts supporting the need for the expert. The defense attorney must clearly show why the defendant will be denied a fair trial without the expert. Undeveloped assertions of need, or a statement that a particular expert would be beneficial, are not sufficient. "[T]he defendant is required to make some plausible showing of how the proposed expert witnesses will be both material and favorable to his or her defense." *Dressler*, 163 Wis. 2d at 639.

Ake makes clear that the motion may be made ex parte. *Ake*, 470 U.S. at 82–83. If the motion is made ex parte, SCR 20:3.3(d) must be followed: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material *facts* known to the lawyer which will enable the tribunal to make an informed decision, whether or not the *facts* are adverse" (emphasis added).

Motions for the appointment of an expert and for an ex parte hearing, and a sample brief in support of the motions, have been included in this chapter (*infra* Forms 10.28A–10.28C). Before using these documents, the defense attorney should update the case law cited.

Experts who may be of use in a criminal case are limited only by the lawyer's imagination and include the following:

- Accident reconstruction expert
- Accountant
- Arson expert
- Attorney
- Ballistics/firearms expert
- Chemist
- DNA expert
- Fingerprint expert
- Forensic odontologist
- Forensic pathologist
- Handwriting analyst
- Microbiologist
- Nurse
- Physician (consider specialists)
- Polygrapher
- Psychiatrist
- Psychologist
- Serologist
- Social worker
- Statistician/probability expert
- Tool mark, shoe print, or tire print expert
- Toxicologist

Distribution

Forms 10.28A–10.28C

Original:	E-file
Copy:	Client; client file

Notes

Form 10.28A Motion for Ex Parte Hearing (CRM-0168)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________,

Defendant

Case No. *(1.02)*

DEFENDANT'S MOTION FOR EX PARTE HEARING

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order permitting the defendant to file a pretrial motion in camera and ex parte and directing the following:

1. That all proceedings involving the motion to be filed be conducted in camera and ex parte;
2. That all persons having knowledge about the proceedings on this motion be ordered to refrain from commenting or conveying information about the proceedings to the public and the prosecution; and
3. That this motion and all transcripts, briefs, decisions, and other records concerning matters involved in the hearing on this motion be sealed until further order of the court.

The defendant brings this motion pursuant to U.S. Const. amends. V, VI, XIV; Wis. Const. art. I, §§ 7, 8; *Ake v. Oklahoma*, 470 U.S. 68 (1985); and Wisconsin Supreme Court Rule 20:3.3(d).

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]______________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Form 10.28B Motion for Expert Funding (CRM-0169)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

DEFENDANT'S MOTION FOR EXPERT FUNDING

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order authorizing the defendant to hire *(name and/or type of expert)* at county expense. The defendant brings this motion pursuant to U.S. Const. amends. V, VI, XIV; Wis. Const. art. I, §§ 7, 8; and Wis. Stat. §(§) 971.31(2) and (5), *(165.79,/and/885.08-885.10)*.

AS GROUNDS, the defendant asserts the following:

1. The defendant is charged with *(7.01) (Charges)* in violation of Wis. Stat. §*(§)* *(7.02) (Statute No(s).)*.
2. The issues in this case are *(state issues in detail)*.
3. *(Name and/or type of expert)* is necessary because *(state with particularity and in detail the reason or reasons why the expert is necessary)*.
4. The defendant has been found financially eligible by the state public defender for appointment of counsel, and *(2.01) (Attorney Handling Case)* is the attorney duly appointed pursuant to Wis. Stat. § 977.08.
5. The defendant is indigent and cannot otherwise obtain this needed assistance.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type “Electronically signed by”
and your name on this line]________________________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney’s Email Address)

Form 10.28C Sample Brief in Support of Motion for Expert Funding (CRM-0170)

STATE OF WISCONSIN : CIRCUIT COURT : *(1.01)* COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

(1.03) ______________________, Case No. *(1.02)*

Defendant

SAMPLE BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR EXPERT FUNDING

I. Background and Legal Setting

This brief is submitted in support of the defendant's motion to have the court provide funding for *(name and/or type of expert)*.

(Add the following paragraph if motion and brief are being filed ex parte.)

Under Wisconsin Supreme Court Rule 20:3.3(d), *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *State ex rel. Dressler v. Racine County Circuit Court*, 163 Wis. 2d 622, 640 n.12, 472 N.W.2d 532 (Ct. App. 1991), this brief and the requisite showing may be made ex parte.

(Continue)

The defendant in this case is charged with *(7.01) (Charges)* in violation of Wis. Stat. §*(§)* *(7.02) (Statute No(s).)* of the Wisconsin Statutes. In particular, the defendant is alleged to have acted as follows:

(Insert detailed statement of the allegations against the defendant.)

The issues requiring expert assistance in this case are the following:

(Insert detailed statement or listing of the relevant issues.)

Accordingly, the defendant is moving the court to authorize the funding for *(name and/or type of expert)*.

Based on *(statements or conversations with the expert, review of the scientific literature, or other basis)*, it is expected that the *(type of expert)* will be able to *(set forth, in as much detail as possible, what the expert will be able to do or testify to)*. The assistance of a *(type of expert)* is essential and necessary to this case because *(set forth, in as much specific detail as possible, why the expert is needed and what impact the expert is expected to have on the case; note that general assertions of need are not sufficient)*.

II. Court's Obligation to Provide Expert Assistance upon Showing of Necessity

The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Wis. Const. art. I, § 7 and the U.S. Const. amend. VI. *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). "The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 294–95 (1973)).

Notions of fundamental fairness demand that an indigent defendant be given the state's assistance in securing "the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). "This right includes the trial court's assistance in compelling the attendance of witnesses and the right to put before a jury evidence that might influence the determination of guilt." *State v. Kirschbaum*, 195 Wis. 2d 11, 20, 535 N.W.2d 462 (Ct. App. 1995) (*citing Taylor v. Illinois*, 484 U.S. 400, 408 (1988)).

At the request of the defense, it is "within the discretion of a trial judge to authorize the hiring of an expert or an investigator to prepare for trial." *Ruff v. State*, 65 Wis. 2d 713, 723, 223 N.W.2d 446 (1974); *Watson v. State*, 64 Wis. 2d 264, 276, 219 N.W.2d 398 (1974). For the court to properly exercise its discretion, the defendant must make a plausible showing that the proposed expert witness is both material and favorable (i.e., necessary) to the defense. *State ex rel. Dressler v. Racine Cnty. Circuit Ct.*, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991).

[The following language could be used when counsel is requesting the court to provide funding for a psychiatric expert; requests for other types of experts could follow the same framework. The Ake *opinion used the terms "sanity" and "insanity"; the Wisconsin Statutes refer to "mental disease or defect."* See, e.g.*, Wis. Stat. § 971.15 (mental responsibility of defendant).]*

In *Ake*, the U.S. Supreme Court held that the defense is entitled to the services of an expert under the following circumstances:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. 68, 83 (1985). This right to the assistance of a defense psychiatrist means the right to have a competent psychiatrist "conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. Although a state is not required to purchase for an indigent defendant "all the assistance that his wealthier counterpart might buy," fundamental fairness entitles defendants to "an adequate opportunity to present their claims fairly within the adversary system." *Id.* at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

Thus, the constitutional guarantee of due process requires that, if the threshold showing of necessity is made, the court must provide funding for a *(type of expert)*.

The defendant's need for *(name and/or type of expert)* has been set out above in as much detail as possible. For the defendant to properly confront and present testimony, a *(type of expert)* is required on the issue of *(identify issue)*. The defendant has met *(his/her)* burden of showing that the issue of *(state issue)* is necessary to the defense. *See Dressler*, 163 Wis. 2d at 640.

It would be fundamentally unfair to deny the defendant the assistance of *(name and/or type of expert)*. The defendant will suffer *(insert detailed statement of adverse consequences)*. These adverse consequences would result in a denial of due process to the defendant and must be avoided.

Accordingly, the defendant respectfully requests that *(his/her)* motion to have the court provide funding for a *(type of expert)* be granted.

Dated: ______________________________

(2.03) (Firm/Office Name)
Attorneys for the Defendant

[Type "Electronically signed by"
and your name on this line]____________

State Bar No. *(2.02)*

(2.04) (Firm/Office Address)
(2.05) (Firm/Office Telephone No.)
(2.07) (Attorney's Email Address)

Appendices

A Truth in Sentencing II—Penalty Chart (CRM-0171)

B Pre-Sentence Investigation Recommendation Guidance to Agents of the Division of Community Corrections (CRM-0172)

C Wisconsin Circuit Court Fee, Forfeiture, Fine and Surcharge Tables (CRM-0173)

Appendix A

Truth in Sentencing II—Penalty Chart (CRM-0171)

TRUTH IN SENTENCING II – PENALTY CHART[1]

FELONY CLASS	MAXIMUM IMPRISONMENT (BIFURCATED SENTENCE)	MAXIMUM CONFINEMENT	MAXIMUM EXTENDED SUPERVISION	MAXIMUM FINE	MAXIMUM PROBATION
A	Life	Life			
B	60 years	40 years	20 years		40 years
C	40 years	25 years	15 years	$100,000	25 years
D	25 years	15 years	10 years	$100,000	15 years
E	15 years	10 years	5 years	$50,000	10 years
F	12.5 years	7.5 years	5 years	$25,000	7.5 years
G	10 years	5 years	5 years	$25,000	5 years
H	6 years	3 years	3 years	$10,000	3 years
I	3.5 years	1.5 years	2 years	$10,000	3 years
MISDEAMEANOR CLASS (habitual criminality)					
A	2 years	1.5 years	1 year	$10,000	2 years
B	2 years	1.5 years	1 year	$1,000	2 years
C	2 years	1.5 years	1 year	$500	2 years

TIS II – Wis. Stat. ch. 973 (as amended by 2001 Wis. Act 109)

- Applies to offenses committed on or after February 1, 2003
- Bifurcated Sentence [Imprisonment] = Confinement + Extended Supervision
- Minimum Term of Confinement: 1 year
- Minimum Term of Extended Supervision: not less than 25% of the term of Confinement
- Confinement + Extended Supervision may not exceed Maximum Imprisonment (Bifurcated Sentence)
- Minimum Term of Probation: 1 year for felony; 6 months for misdemeanor
- Does not apply to life sentences
- Unclassified felonies and misdemeanors-habitual criminality
    - Maximum Confinement = 75% of total length of Bifurcated Sentence and all remaining time must be the term of Extended Supervision

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[1] This document was originally drafted by then-Judge Patrick J. Fiedler, as of January 1, 2005. It has been updated through the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267.

BOOT CAMP

Wis. Stat. § 973.01(3m) Challenge Incarceration Program
Eligibility Court shall decide whether person is eligible or ineligible.
Not eligible if convicted of any of the following:

- All Wis. Stat. ch. 940 crimes
- Wis. Stat. § 941.29(1g)(a) – Any "violent felony" listed in statute
- Wis. Stat. § 941.29(1g)(b) (not including Wis. Stat. § 951.02, 951.08, 951.09, or 951.095) – Any "violent misdemeanor" listed in statute
- Wis. Stat. § 948.02(3) – Sexual assault of a child
- Wis. Stat. § 948.055 – Causing a child to view or listen to sexual activity
- Wis. Stat. § 948.075 – Use of a computer to facilitate a child sex crime
- Wis. Stat. § 948.095 – Sexual assault of a student by a school instructional staff person

Wis. Stat. § 302.045(2) Program Eligibility

(a) Inmate volunteers,
(b) Inmate under age 40 as of date inmate begins the program,
(c) Inmate not convicted of certain crimes [see above],
(cm) Sentencing court decides inmate is eligible,
(d) DOC determines that inmate has a substance abuse problem, and
(e) DOC determines that inmate has no psychological, physical or medical limitations that would preclude participation.

Note: The court's decision is an "exercise of sentencing discretion." Even if the offender meets all of the DOC eligibility requirements under Wis. Stat. § 302.045(2), the trial court has the discretion under Wis. Stat. § 973.01(3m) to declare an offender ineligible for boot camp. See *State v Steele*, 2001 WI App 160, ¶ 11, 246 Wis. 2d 744, 632 N.W.2d 112, where the trial court decided that the defendant was not eligible for boot camp "due to the seriousness of the offenses."

Note:

1. Both the court and DOC must find the inmate eligible in order for the inmate to be placed in boot camp. [Wis. Stat. § 973.01(3m)] [Wis. Stat. § 302.045(2)(cm)]
2. Boot camp is 6 months long. The program shall provide participants with strenuous physical exercise, manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony and counseling in preparation for release on extended supervision. [Wis. Stat. § 302.045(1)]
3. Successful completion of boot camp results in release to extended supervision within 30 days; balance of unused confinement is converted to extended supervision; total length of original bifurcated sentence does not change; court may not increase the total length of the bifurcated sentence. [Wis. Stat. § 302.045(3m)(b)]

EARNED RELEASE PROGRAM

Wis. Stat. § 973.01(3g) Earned Release Program Eligibility
Court shall decide whether person is eligible or ineligible.

Not eligible if convicted of any of the following:

- All Chapter 940 crimes
- Wis. Stat. § 948.02 – Sexual assault of a child
- Wis. Stat. § 948.025 – Engaging in repeated acts of sexual assault of the same child
- Wis. Stat. § 948.03 – Physical abuse of a child
- Wis. Stat. § 948.05 – Sexual exploitation of a child
- Wis. Stat. § 948.051 – Trafficking of a child
- Wis. Stat. § 948.055 – Causing a child to view or listen to sexual activity
- Wis. Stat. § 948.06 – Incest with a child
- Wis. Stat. § 948.07 – Child enticement
- Wis. Stat. § 948.075 – Use of a computer to facilitate a child sex crime
- Wis. Stat. § 948.08 – Soliciting a child for prostitution
- Wis. Stat. § 948.085 – Sexual assault of a child placed in substitute care
- Wis. Stat. § 948.095 – Sexual assault of a student by a school instructional staff person

Wis. Stat. § 302.05(3) Program Eligibility
(a)1. Inmate not convicted of certain crimes [see above]
(a)2. Sentencing court decides inmate is eligible.

Note: The court's decision is an "exercise of sentencing discretion."
See, e.g., *State v Steele*, 2001 WI App 160, 246 Wis.2d 744, 632 N.W.2d 112.

Note: Successful completion of the earned release program results in release to extended supervision within 30 days; balance of unused confinement is converted to extended supervision; total length of original bifurcated sentence does not change. [Wis. Stat. § 302.05(3)(c)]

PROBATION

Length of Probation [Wis. Stat. § 973.09(2)]

1. Misdemeanors: not less than 6 months nor more 2 years
    a. up to 3 years if defendant convicted of 2–4 misdemeanors at same time
    b. up to 4 years if defendant convicted of 5 or more misdemeanors at same time

2. Felonies: not less than 1 year nor more than either the maximum term of confinement in prison or 3 years, whichever is greater
    a. up to 1 additional year of probation for each felony, if defendant convicted or 2 or more crimes, including at least 1 felony

Note: Wis. Stat. § 973.09(2)(a) applies to probation for misdemeanors and Wis. Stat. § 973.09(2)(b) to felonies; Wis. Stat. § 973.09(2)(b)2. does not authorize increasing probation for a misdemeanor if the defendant is convicted of a felony at the same time. *State v Reagles*, 177 Wis. 2d 168, 501 N.W.2d 861 (Ct. App. 1993).

Note: A misdemeanor with a penalty enhancer is still a misdemeanor. *State v Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984).

PENALTY ENHANCERS

Applicable Statutes
Wis. Stat. § 973.01(2)(a), (c)1., 2.

Wis. Stat. § 973.01(2)(a) **[Bifurcated Sentence / Imprisonment]**

1. **Classified felony –**

Total length of bifurcated sentence may not exceed the maximum period of imprisonment specified in Wis. Stat. § 939.50(3), plus additional imprisonment authorized by any applicable penalty enhancement statutes

2. **Unclassified felony or misdemeanor –**
   Total length of bifurcated sentence may not exceed the maximum term of imprisonment provided by statute for the crime, plus additional imprisonment authorized by any applicable penalty enhancement statutes

Wis. Stat. § 973.01(2)(c)1. **[Confinement]**
Subject to the minimum period of extended supervision required under Wis. Stat. § 973.01(2)(d);
Classified felony / Unclassified felony or misdemeanor–

1. Maximum term of confinement in prison may be increased by any applicable penalty enhancement statute
2. If the maximum term of confinement in prison is increased, the total length of the bifurcated sentence that may be imposed is increased by the same amount

Wis. Stat. § 973.01(2)(c)2. **[Imprisonment / Bifurcated Sentence]** Calculation of maximum term of imprisonment if more than one penalty enhancement statute applies to a single crime – apply in the order listed:

A group [Wis. Stat. § 973.01(2)(c)2.a.]
Wis. Stat. § 939.621 [certain domestic abuse offenses]
Wis. Stat. § 939.623 [certain crimes in which elder person is victim]
Wis. Stat. § 939.632 [violent crime in a school zone]
Wis. Stat. § 939.635 [certain crimes against children committed by a child care provider]
Wis. Stat. § 939.645 [hate crime]
Wis. Stat. § 946.42(4) [escape if individual who had custody was injured]
Wis. Stat. § 961.442 [industrial hemp]
Wis. Stat. § 961.46 [drug distribution to person under age 18]
Wis. Stat. § 961.49 [drug distribution on or near certain places]
B group [Wis. Stat. § 973.01(2)(c)2.b.]
Wis. Stat. § 939.63 [use of a dangerous weapon]
C group [Wis. Stat. § 973.01(2)(c)2.c.]
Wis. Stat. § 939.62(1) [habitual criminality]
Wis. Stat. § 961.48 [drug repeater]

Note: Wis. Stat. § 973.01(2)(d) **[Extended Supervision]**

1. Penalty enhancers are not applied to the potential term of extended supervision, i.e., the potential maximum term of extended supervision is never increased.
2. The term of extended supervision may not be less than 25% of the term of confinement in prison that is imposed.

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PENALTY ENHANCERS (cont.)

Wis. Stat. § 973.01(2)(c)2. **[Imprisonment / Bifurcated Sentence]** Calculation of maximum term of **imprisonment** if more than one penalty enhancement statute applies to a single crime
– apply in the order listed:

A group [Wis. Stat. § 973.01(2)(c)2.a.]
Wis. Stat. § 939.621 [certain domestic abuse offenses]
> + 2 years (penalty increase changes misdemeanor to felony)
Wis. Stat. § 939.623 [certain crimes in which elder person is victim]
> maximum term of imprisonment of 1 year or less, + 2 years
> maximum term of imprisonment of more than 1 year and not more than 10 years, + 4 years
> maximum term of imprisonment of more than 10 years, + 6 years
Wis. Stat. § 939.632 [violent crime in a school zone]
> felony, + 5 years

> misdemeanor, + 3 months in the county jail

Wis. Stat. § 939.645 [hate crime]

> misdemeanor other than a Class A misdemeanor, revised maximum term of imprisonment is 1 year in the county jail and revised maximum fine is $10,000
> Class A misdemeanor, status of crime changes to a felony with fine of $10,000 and term of imprisonment of 2 years
> felony, + 5 years, + $5000

Wis. Stat. § 946.42(4) [escape with injury to custodian]

> + 5 years

Wis. Stat. § 946.442 [industrial hemp]

> misdemeanor, + 6 months
> felony, + 3 years

Wis. Stat. § 961.46 [drug distribution to person under age 18]

> + 5 years

Wis. Stat. § 961.49 [drug distribution / certain places]

> + 5 years

B group [Wis. Stat. § 973.01(2)(c)2.b.]

Wis. Stat. § 939.63 [use of a dangerous weapon]

> misdemeanor, + 6 months
> felony with maximum term of imprisonment of more than 5 years or life, + 5 years
> felony with maximum term of imprisonment of more than 2 years but not more than 5 years, + 4 years
> any other felony, + 3 years

PENALTY ENHANCERS (cont.)

C group [Wis. Stat. § 973.01(2)(c)2.c.]

Wis. Stat. § 939.62(1) [habitual criminality]

> maximum term of imprisonment of 1 year or less, revised maximum term of imprisonment is 2 years
> maximum term of imprisonment of more than 1 year but not more than 10 years,
+ 2 years if prior convictions were for misdemeanors
+ 4 years if prior conviction was for a felony
> maximum term of imprisonment of more than 10 years,
+ 2 years if prior convictions were for misdemeanors
+ 6 years if prior conviction was for a felony

Wis. Stat. § 961.48 [drug repeater]

> Class C or D felony, + 6 years
> Class E, F, G, H, or I felony, + 4 years

ATTEMPT

Applicable Statutes
Wis. Stat. § 939.32(1) Attempt. Generally
Wis. Stat. § 939.32(1g) Maximum Penalty
Wis. Stat. § 939.32(1m) Bifurcated Sentences

STEP 1

GO TO
Wis. Stat. § 939.32(1) - Attempt to commit a Felony,
or a Battery [Wis. Stat. § 940.19],
or a Battery to an unborn child [Wis. Stat. § 940.195],
or a Theft [Wis. Stat. § 943.20],
or a Theft of farm-raised fish [Wis. Stat. § 943.74]

THEN GO TO STEP 2 for **FINE** and **IMPRISONMENT** penalty formulas,

EXCEPT for the following attempted crimes:

1. Class A felony --> Class B felony;
2. Class I felony (without an **A group** or a **B group** penalty enhancer) --> Class A misdemeanor
3. Intimidation of witness or victim [Wis. Stat. §§ 940.42 to 940.45] --> same as completed act
4. Disarming a peace officer [Wis. Stat. § 941.21] --> same as completed act
5. Causing a child to view or listen to sexual activity [Wis. Stat. § 948.055(1)] --> same as completed act

6. Child enticement [Wis. Stat. § 948.07] --> same as completed act
7. Use of computer to facilitate a child sex crime [Wis. Stat. § 948.075(1r)] --> same as completed act
6. Discharge of firearm in a school zone [Wis. Stat. § 948.605(3)(a)] --> same as completed act
7. False statements to financial institutions [Wis. Stat. § 946.79] --> same as completed act
8. Anhydrous ammonia [Wis. Stat. § 101.10(3)(e)] --> same as completed act

STEP 2 FINE

FINE = one-half of the maximum fine for the completed crime **[Wis. Stat. § 939.32(1g)(a)]**

GO TO STEP 3

ATTEMPT (cont.)

STEP 3 IMPRISONMENT

If there is not a **C group** penalty enhancer, then determine **IMPRISONMENT** by the following method: [**Wis. Stat. § 939.32(1g)(b)1.]**

1. Take the maximum term of **imprisonment**
2. Add any **A group** or **B group** penalty enhancer for the completed crime
3. Multiply by 0.5

If there is a **C group** penalty enhancer, then determine **IMPRISONMENT** by the following method: **[Wis. Stat. § 939.32(1g)(b)2.]**

1. Take the maximum term of **imprisonment**
2. Add any **A group** or **B group** penalty enhancer for the completed crime
3. Multiply by 0.5
4. Apply the **C group** penalty enhancer to the product

GO TO STEP 4

STEP 4 CONFINEMENT

If the crime is not a classified felony, **THEN GO TO STEP 6**

If the crime is a classified felony and there is not a **C group** penalty enhancer, then determine **CONFINEMENT** by the following method: **[Wis. Stat. § 939.32(1m)(a)1.]**

1. Take the maximum term of **confinement**
2. Add any **A group** or **B group** penalty enhancer for the completed crime
3. Multiply by 0.5

If the crime is a classified felony and there is a **C group** penalty enhancer, then determine **CONFINEMENT** by the following method: **[Wis. Stat. § 939.32(1m)(a)2.]**

1. Take the maximum term of **confinement**
2. Add any **A group** or **B group** penalty enhancer for the completed crime
3. Multiply by 0.5
4. Apply the **C group** penalty enhancer to the product

GO TO STEP 5

9

ATTEMPT (cont.)

STEP 5 EXTENDED SUPERVISION

EXTENDED SUPERVISION = one-half of the maximum term of extended supervision for the completed crime **[Wis. Stat. § 939.32(1m)(b)]**

The term of **EXTENDED SUPERVISION** may not be less than 25% of the term of **CONFINEMENT** in prison which is actually imposed. **[Wis. Stat. §§ 939.32(1m)(a), 973.01(2)(d)]**

STOP

STEP 6 CONFINEMENT

This step is for unclassified felonies and misdemeanors. **[Wis. Stat. § 939.32(1m)(c)]**
Determine **CONFINEMENT** by the following method:

1. Take the maximum term of **IMPRISONMENT** determined in **STEP 3**
2. Multiply the **IMPRISONMENT** by 75%
3. The product is the maximum term of **CONFINEMENT** **[Wis. Stat. § 973.01(2)(b)10.]**

GO TO STEP 7

STEP 7 EXTENDED SUPERVISION

This step is for unclassified felonies and misdemeanors. **[Wis. Stat. § 939.32(1m)(c)]**
The maximum term of **EXTENDED SUPERVISION** **equals**
the maximum term of **IMPRISONMENT**
minus the term of **CONFINEMENT** in prison which is actually imposed.

The term of **EXTENDED SUPERVISION** may not be less than 25% of the term of **CONFINEMENT** in prison which is actually imposed. **[Wis. Stat. § 973.01(2)(d)]**;

in actuality, the term of **EXTENDED SUPERVISION** may not be less than 33 1/3% of
the term of **CONFINEMENT** in prison which is actually imposed. **[*State v Cole*, 2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700.]**

STOP

Appendix B

Pre-Sentence Investigation Recommendation Guidance to Agents of the Division of Community Corrections (CRM-0172)

Rev. 04/01/2010

Pre-Sentence Investigation Recommendation Guidance to Agents of the Division of Community Corrections

A. Introduction:

Act 283 became effective on December 31, 1999, created a new determinate sentencing system in Wisconsin called "Truth-in-Sentencing "(TIS). A TIS sentence to prison is comprised of a specified period of confinement (CT) and a specified period of extended community supervision (ES). Discretionary parole was eliminated. Probation as a disposition was not substantially changed. This legislation is referred to as TIS I.

Subsequently, there have been two sets of modifications to the law. Major changes became effective on February 1, 2003 and are referred to as TIS II. A second set of more minor changes became effective on July 26, 2003.

TIS legislation was designed to bring certainty to sentencing. It also substantially increased the total potential penalty for most offenses. However, it did not require the imposition of longer prison sentences nor did it suggest that offenders should be held in confinement for periods of time longer than under prior law"[1]

The Department of Corrections (DOC) developed a Pre-Sentence Investigation Recommendation Grid and process to guide agents in making sentencing recommendations under the new law.

B. Development of a Pre-Sentence Recommendation Grid

Sentencing decisions are extremely complex. Therefore, the PSI Grid process was designed to assist DOC staff in making informed, reasoned sentencing recommendations to courts by integrating three elements which are applied in the following order:

1. **The classification of the felony conviction**
2. **The relative seriousness of this particular offense compared to other crimes in the same class**
3. **The risk of the offender**

A critical element of making a sentencing recommendation is **context.** The agent is trained to look at the offense, the offender, and the risk.

The offense is analyzed and compared to similar offenses historically. Aggravating factors such as victim age, vulnerability, economic impact, and use of weapons or violence are considered when determining severity of the offense. Mitigating factors, such as

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[1] Hammer, Thomas, "Truth In Sentencing Part II: 2001 Wisconsin Act 109—Crimes and Their Penalties" Marquette Univ. Law School, Presentation at the 2002 Office of the Wisconsin State Public Defender Conference, Sept. 26-27,2002

duress, ignorance of the crime, or physical and mental impairments are also considered when determining the severity of an offense

The offenders risk is evaluated using the same factors the department uses to determine case classification, which have been shown to be associated with success on supervision.

The grid is designed to guide agents in preparing Pre-Sentence Investigation recommendations under TIS. The grid is the department's tool, and it does not diminish the need for gathering and analyzing information, or making a recommendation based on sound professional judgment.

C. Process:

In order to use the grid, the Pre-Sentence writer must first gather all of the information required to complete the report (according to current practice), identify the offense class, assess the offense seriousness, and complete the risk scale. The steps to complete this process are as follows:

1. **Determine the date of the crime**
   Crimes committed on December 31, 1999 through Jan 31, 2003 are considered "TIS I." Crimes committed on or after February 1, 2003 are considered "TIS II".
2. **Determine the offense class using the correct grid**
   TIS I has an A-E felony class system and TIS II has an A-I felony class system. Select the appropriate classification from the Offense Class column. It must be one of the classes A-E for TIS I or A-I for TIS II.
3. **Determine the seriousness of the particular offense within that offense class**
   The majority of cases should fall into the Neutral category, and should not be classified as aggravated or mitigated without a clear and compelling reason. See section D for further instruction on determining severity levels.
4. **Complete the Risk Assessment (DOC 2244)**
   Based upon the score, the offender will be classified as "lower", "medium", or "higher" risk.
5. **Locating the appropriate cell on the sentencing grid**
   Find the appropriate Offense Class. Next, locate the appropriate "Risk" row (Lower, Medium or Higher Risk) for that Class. Look to the right, along that row. Find the cell which is directly beneath the appropriate Offense Severity heading for the offense (Mitigated, Neutral or Aggravated). Note the color of the cell. The color indicates whether there is a presumption for prison, probation or "no presumption". The number(s) in the cell indicate the range of Confinement Time to recommend if prison will be the department's recommendation. Continue to the right in the same row. The green cell in that row indicates the term of Extended Supervision to recommend. (Note: If the recommended ES range is less than 25% of the recommended Confinement Time, increase the ES recommendation to meet that minimum requirement.)

6. **If Recommending Probation**
   When recommending an Imposed and Stayed sentence, the numbers in the yellow, blue and red boxes represent confinement time, and the green boxes represent the extended supervision portion of the bifurcated sentence. The numbers on the grid are not relevant when recommending a withheld sentence. The grid does not make a recommendations for a specific term of probation.

D. Determining the Seriousness of the Offense including Aggravating and Mitigating Circumstances:

The court must consider the following factors as aggravating factors. Consistent with 937.017 WI Stat, the department will also consider the following as aggravating factors for the purpose of the PSI Grid.

1. The person concealed or disguised his/her identity
2. The person committed the crime using information disclosed under §301.46
3. Gang related activity
4. Crime was committed while wearing a bullet proof vest
5. Caused harm or property damage (loss of $25,000+ value) or threatened force with intent to influence governmental policy or to punish a governmental unit
6. A sex crime committed by a person who knew she/he was infected with certain sexually transmitted diseases.
7. A victim of a violent felony is age 62 or older.
8. A child sexual assault or child abuse committed by a person responsible for the child's care.
9. In any Homicide, or Injury by intoxicated Use of a Vehicle offense, if there was a passenger under age 16 or an unborn child in the person's vehicle.
10. In any controlled substances offense if the offense involved delivery, etc. to a prisoner, or involved a Schedule I or II substance and the person knowingly used a public vehicle during the violation.

Do not consider a factor as aggravating if it is an element of the crime as defined in the statutes. For example: In a *First Degree Sexual Assault of a Child*, you should NOT consider the fact that the victim is a child as an aggravating factor since it is an element of the charge. In an *Armed Robbery*, you would NOT consider the weapon as an aggravating factor since it is an element of the charge.

An agent should consider whether other circumstances of the offense should be considered as aggravating or mitigating factors.
Additional aggravating factors may include: multiple victims, extreme injury, use of a weapon, duration, extreme cruelty, played a leading role
Mitigating factors may include: coercion or duress, impaired judgment due to extreme youth or age, and lacking substantial capacity for judgment due to physical or mental impairment
Additional risk factors such as: cooperation, genuine remorse, prepaid restitution, and placement in treatment prior to sentencing, should be considered when deciding between recommending prison or a term of probation

Once you have reviewed all of the information during your investigation and have examined it based on the aggravating and mitigating factors of the offense, you must assign a level of seriousness – "Mitigated", "Neutral", or "Aggravated".

- Neutral means the offense is similar in nature to most other offenses in that classification
- The majority of cases should fall into the Neutral category
- You should be able to clearly explain any aggravating or mitigating factors
- Do not make recommendations based on an emotional response to the offense

See assessing the WI Sentencing Guideline Note and Assessing Severity of the Offense for further guidelines in assessing severity levels.

E. Determining the Risk Category:

The agent will complete the DOC 2244 PSI Risk Assessment. The rules for scoring each item are the same as when scoring the 502. The risk score threshold for determining risk levels are not the same as the thresholds for determining supervision levels.
The thresholds for the DOC 2244 are as follows:

1. A score of 0-8 points = Lower Risk
2. A score of 9-14 points = Medium Risk
3. A score of 15 + points= Higher Risk

F. Probation Recommendations

The minimum term of probation for a felony is 1 year.

- For TIS 1, the term of probation may be from 1 year up to the maximum imprisonment for that offense class, or 3 years whichever is greater.
- For TIS 2, the term of probation may be from 1 year up to the maximum confinement for that offense class, or 3 years whichever is greater.

Decisions on the length of probation will continue to be based upon the goals and objectives of the community supervision. This grid does not prescribe the length of the term recommended.

G. Presumed Recommendation boxes within the Grid

Within the Grid:

1. **Yellow Cells represent a Presumed Probation** recommendation. You have a variety of options within these cells including:
   - **a.** You may recommend a Withheld Sentence with a term of probation.
   - **b.** You may recommend an Imposed and Stayed Sentence with a maximum confinement time of one year in prison and a term of extended supervision as defined by the corresponding green cell.
   - **c.** You may recommend an Imposed and Stayed county jail sentence, with a term of probation.
   - **d.** You may recommend a term one year or less to be served in the county jail with no probation recommendation.

2. **Blue Cells represent No Presumption.** Within these cells, you may recommend *either* Probation or Imprisonment, depending upon the circumstances of the case. Within these cells you have a number of options including:
   a. You may recommend a Bifurcated Sentence to WSP using the confinement time within the applicable blue cell and a term of Extended Supervision defined by the corresponding green cell.
   b. You may recommend a Withheld Sentence, with a term of probation.
   c. You may recommend an Imposed and Stayed Sentence using the corresponding cells to determine your recommendation of Confinement Time and Extended Supervision.
   d. If you recommend probation, you may recommend any of the conditions of supervision including confinement in the county jail.
3. **Red Cells represent a Presumed Imprisonment** recommendation. The numbers in the red cells represents the years of recommended Confinement Time. The numbers in the green cells represent the recommended years of Extended Supervision.
   Unless barred by statute, you may recommend probation on any case that falls within the red cells. However, it is presumed that those situations will be rare if any.
4. **Green Cells indicate the recommended term of Extended Supervision**
   The Extended Supervision recommendations are determined by the offenders risk and not the severity of the offense.

H. Example

You are assigned to write a PSI on a Robbery committed on March 30, 2003. Based on the date of offense, the case falls under TIS II and is a class E felony. According to the criminal complaint the offender was masked when he committed the Robbery. Concealing ones identity during the commission of a crime is a statutorily aggravating factor; therefore you classify the severity of the offense as aggravated.

First locate the appropriate section of the TIS II grid for a Class E felony. This offense class carries a maximum Confinement Time of 10 years, and a maximum term of Extended Supervision of 5 years. Locate the aggravated column as demonstrated below.

	Confinement			Extended Supervision:
OFFENSE CLASS	**Mitigated**	**Neutral**	**Aggravated**	**Greater of 25% of Confinement or:**
E (Max=10CT)				**5y Max**
Lower Risk	**1y**	**2-3y**	**4-5y**	**1-2y**
Medium Risk	**1y**	**3-4y**	**5-7y**	**2-3y**
Higher Risk	**1y**	**4-5y**	**7-10y**	**3-4y**

You have completed a DOC 2244 and determined the risk score to be 13. Locate the medium risk cell in the aggravated column as demonstrated below. That placed the offender in a presumptive prison cell.

In this example, the grid recommends that the offender be sentenced to 5-7 years Confinement Time with 2-3 years Extended Supervision.

	Confinement			Extended Supervision:
OFFENSE CLASS	Mitigated	Neutral	Aggravated	Greater of 25% of Confinement or:
E (Max=10CT)				5y Max
Lower Risk	1y	2-3y	4-5y	1-2y
Medium Risk	1y	3-4y	5-7y	2-3y
Higher Risk	1y	4-5y	7-10y	3-4y

I. Departure from the Grid Recommendation.

Analysis of the initial implementation of the PSI Grid has demonstrated that actual court dispositions agree with the grid recommendation much more often than not. Because of that, agents are expected to give strong consideration to the disposition recommended by the grid.

In certain situations an agent may determine, based on the circumstances of the case and their professional judgment, that the PSI Grid recommendation is not appropriate. In those cases the agent may make a recommendation lower than the grid recommendation with supervisory approval. Any recommendation to exceed the grid must be approved by the supervisor and the Regional Chief.

J. Sex Offenders

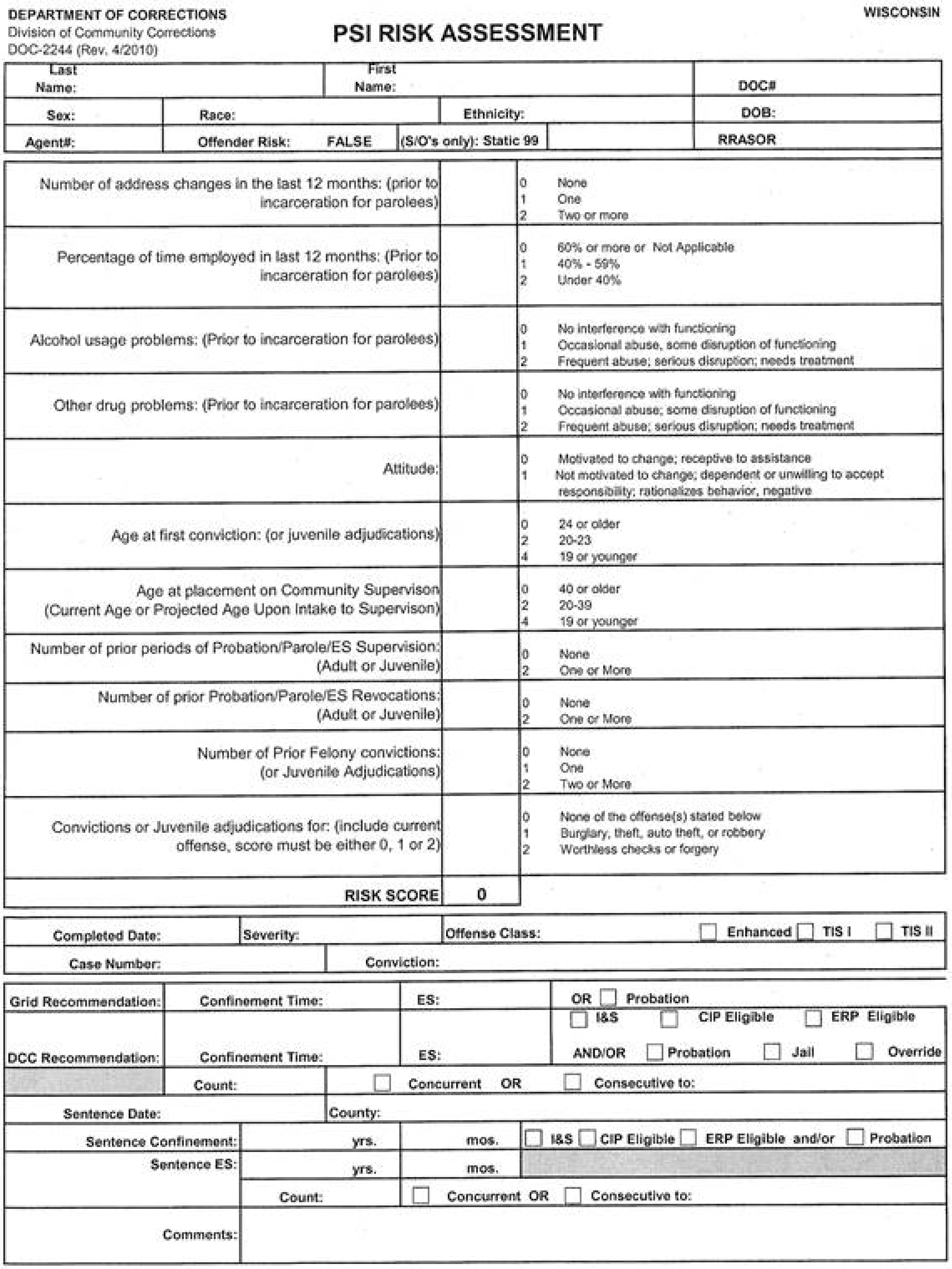
Preliminary testing indicates that this risk instrument will score the offender in the same or higher risk category as actuarial sex offender risk instruments about 85% of the time. However, for those cases in which a sex offender scores as low risk, the agent may want to request that a validated sex offender risk assessment tool be completed on that offender. The results of that assessment may be used to increase the risk designation of the offender.

L. Earned Release Program (ERP) and Challenge Incarceration Program CIP)

The TIS legislation allows for judges to designate qualified offenders as eligible for ERP or CIP based upon statutory eligibility criteria. Agents are required to make a recommendation on all TIS recommendations. The department's recommendation should not be based on where the offender falls on the PSI Grid.
*Refer to the section on CIP and ERP eligibility requirements for further instructions.

M. Consecutive and Concurrent Sentence Recommendations

Legislation and case law presume that in multiple case/count situations, sentences will be concurrent unless specifically ordered to be consecutive. However, the agent/supervisor may recommend consecutive sentences if necessary to accomplish the goals of sentencing.



DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-2244 (Rev. 4/2010)

WISCONSIN

PSI RISK ASSESSMENT

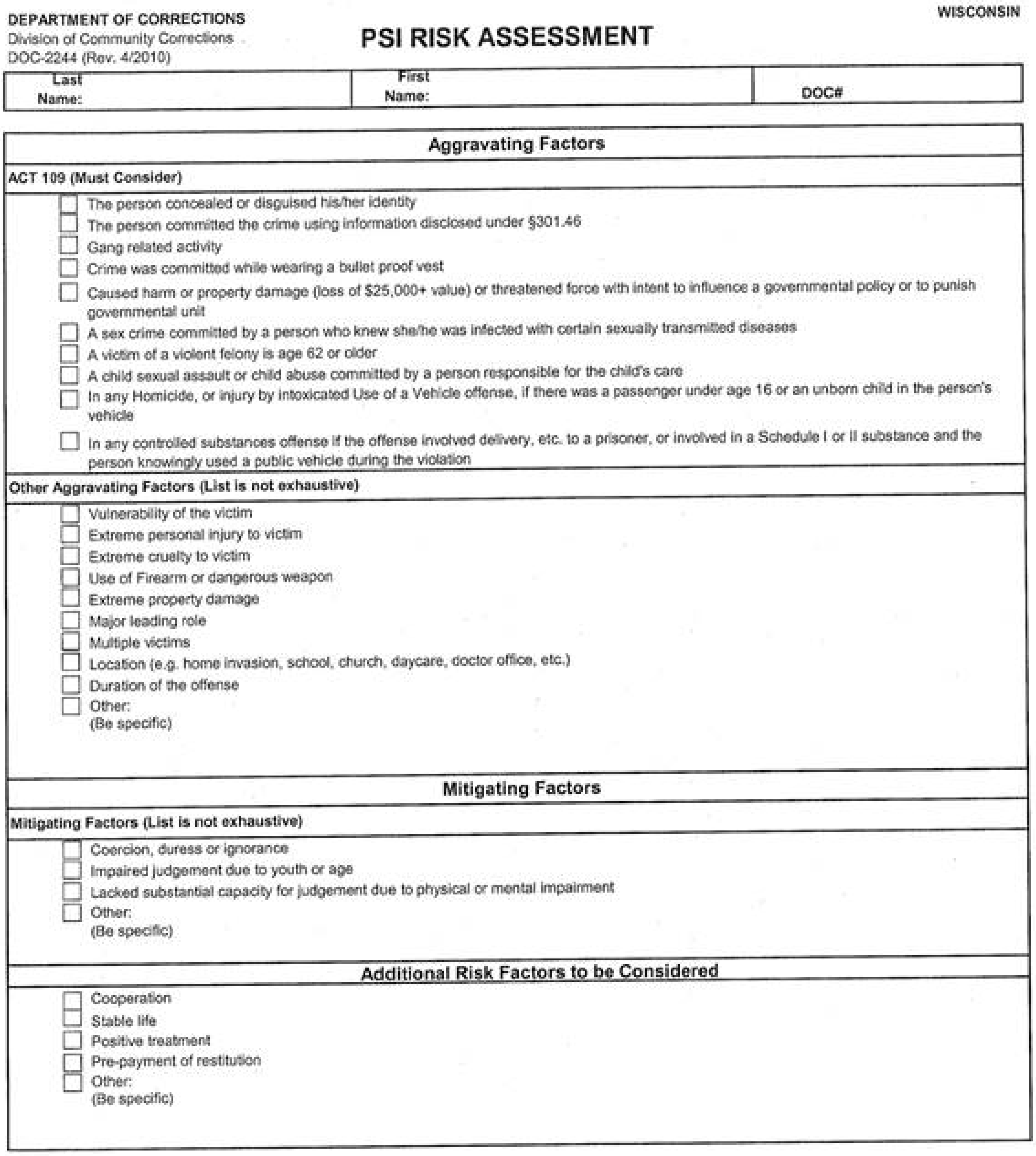
Last Name:		**First Name:**		**DOC#**
Sex:	**Race:**		**Ethnicity:**	**DOB:**
Agent#:	**Offender Risk:** FALSE	**(S/O's only): Static 99**		**RRASOR**

Number of address changes in the last 12 months: (prior to incarceration for parolees)		0 None 1 One 2 Two or more
Percentage of time employed in last 12 months: (Prior to incarceration for parolees)		0 60% or more or Not Applicable 1 40% - 59% 2 Under 40%
Alcohol usage problems: (Prior to incarceration for parolees)		0 No interference with functioning 1 Occasional abuse, some disruption of functioning 2 Frequent abuse; serious disruption; needs treatment
Other drug problems: (Prior to incarceration for parolees)		0 No interference with functioning 1 Occasional abuse; some disruption of functioning 2 Frequent abuse; serious disruption; needs treatment
Attitude:		0 Motivated to change; receptive to assistance 1 Not motivated to change; dependent or unwilling to accept responsibility; rationalizes behavior, negative
Age at first conviction: (or juvenile adjudications)		0 24 or older 2 20-23 4 19 or younger
Age at placement on Community Supervison (Current Age or Projected Age Upon Intake to Supervison)		0 40 or older 2 20-39 4 19 or younger
Number of prior periods of Probation/Parole/ES Supervision: (Adult or Juvenile)		0 None 2 One or More
Number of prior Probation/Parole/ES Revocations: (Adult or Juvenile)		0 None 2 One or More
Number of Prior Felony convictions: (or Juvenile Adjudications)		0 None 1 One 2 Two or More
Convictions or Juvenile adjudications for: (include current offense, score must be either 0, 1 or 2)		0 None of the offense(s) stated below 1 Burglary, theft, auto theft, or robbery 2 Worthless checks or forgery
RISK SCORE	0	

Completed Date:	**Severity:**	**Offense Class:**	☐ **Enhanced** ☐ **TIS I** ☐ **TIS II**
Case Number:	**Conviction:**		

Grid Recommendation:	**Confinement Time:**	**ES:**	**OR** ☐ **Probation**
			☐ **I&S** ☐ **CIP Eligible** ☐ **ERP Eligible**
DCC Recommendation:	**Confinement Time:**	**ES:**	**AND/OR** ☐ **Probation** ☐ **Jail** ☐ **Override**
	Count:	☐ **Concurrent OR**	☐ **Consecutive to:**

Sentence Date:	**County:**		
Sentence Confinement:	**yrs.**	**mos.**	☐ **I&S** ☐ **CIP Eligible** ☐ **ERP Eligible and/or** ☐ **Probation**
Sentence ES:	**yrs.**	**mos.**	
	Count:	☐ **Concurrent OR**	☐ **Consecutive to:**
Comments:			



DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-2244 (Rev. 4/2010)

WISCONSIN

PSI RISK ASSESSMENT

Last Name:	First Name:	DOC#

Aggravating Factors

ACT 109 (Must Consider)

☐ The person concealed or disguised his/her identity
☐ The person committed the crime using information disclosed under §301.46
☐ Gang related activity
☐ Crime was committed while wearing a bullet proof vest
☐ Caused harm or property damage (loss of $25,000+ value) or threatened force with intent to influence a governmental policy or to punish governmental unit
☐ A sex crime committed by a person who knew she/he was infected with certain sexually transmitted diseases
☐ A victim of a violent felony is age 62 or older
☐ A child sexual assault or child abuse committed by a person responsible for the child's care
☐ In any Homicide, or injury by intoxicated Use of a Vehicle offense, if there was a passenger under age 16 or an unborn child in the person's vehicle
☐ In any controlled substances offense if the offense involved delivery, etc. to a prisoner, or involved in a Schedule I or II substance and the person knowingly used a public vehicle during the violation

Other Aggravating Factors (List is not exhaustive)

☐ Vulnerability of the victim
☐ Extreme personal injury to victim
☐ Extreme cruelty to victim
☐ Use of Firearm or dangerous weapon
☐ Extreme property damage
☐ Major leading role
☐ Multiple victims
☐ Location (e.g. home invasion, school, church, daycare, doctor office, etc.)
☐ Duration of the offense
☐ Other:
(Be specific)

Mitigating Factors

Mitigating Factors (List is not exhaustive)

☐ Coercion, duress or ignorance
☐ Impaired judgement due to youth or age
☐ Lacked substantial capacity for judgement due to physical or mental impairment
☐ Other:
(Be specific)

Additional Risk Factors to be Considered

☐ Cooperation
☐ Stable life
☐ Positive treatment
☐ Pre-payment of restitution
☐ Other:
(Be specific)

2244 GUIDELINES

Low = 0 - 8
Med = 9 - 14
High = 15+

Number of Address Changes in Last 12 Months

An address change is defined as one of the following:

- Moving belongings from one residence to another.
- A period of jail confinement, excluding terms of confinement for holds not leading to revocation or ES sanctions.
- Spending 25% or more of nights away from the permanent residence.
- A halfway house or residential placements.
- Homeless at any time in last 12 months

Consistent with the above definition, this item should be scored as follows:

0 = None of the above applies.

1 = Any one of the above applies.

2 = Two or more of the above apply or any one event occurred more than once. Vagrants, carnival workers and migrant workers are automatic.

The following are **not** considered as address changes:

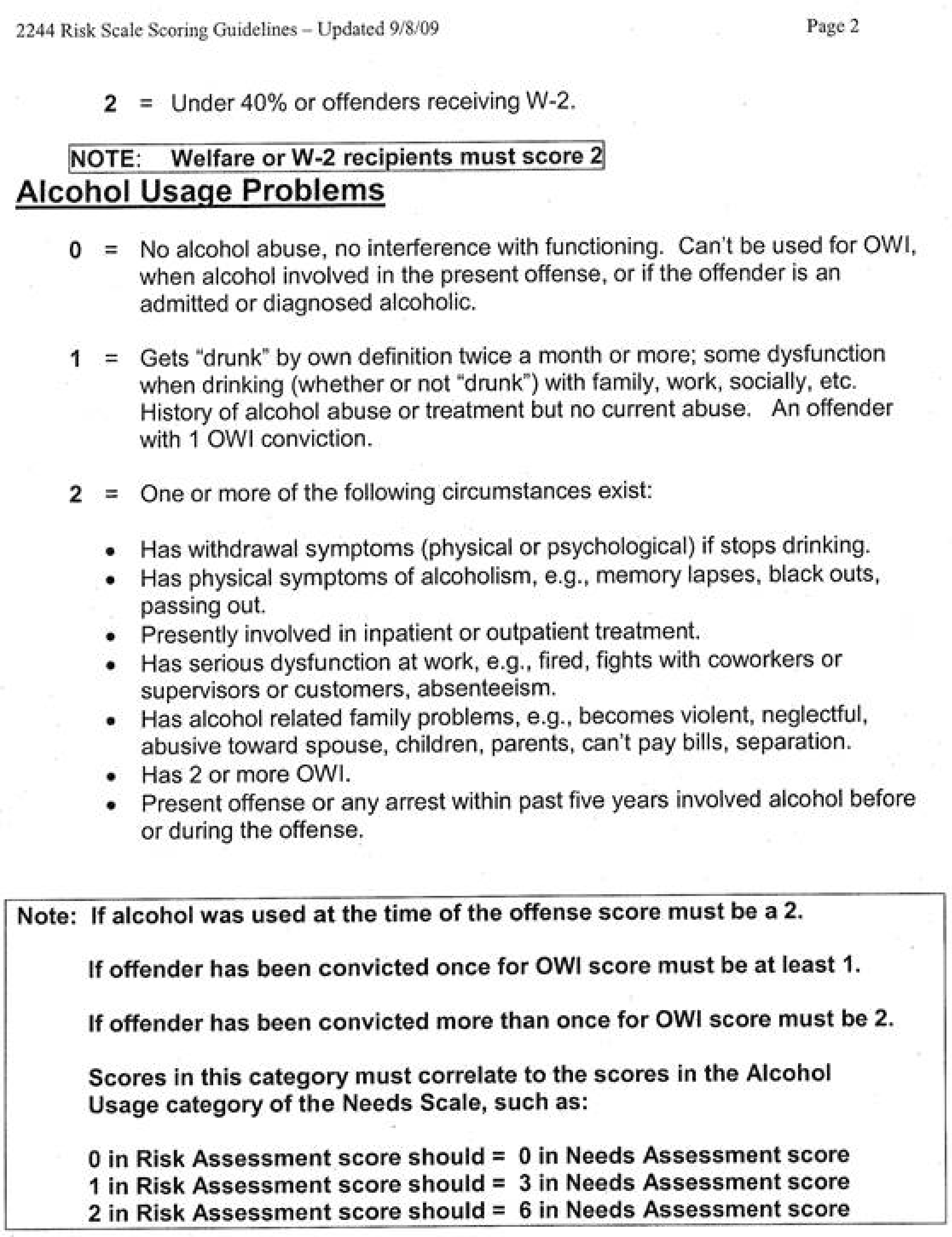
- Over the road truckers.
- College students residing away from home during school.
- Active military duty.
- Moves forced by natural causes, e.g., house fires and floods.

Percent of Time Employed in Last 12 Months

Percentages should be based upon full-time employment (40 hrs. /wk.). For example, 100% employment is 40 hours/wk. for 12 months, 20 hours per week for the past 12 months counts as 50% employed, or 40 hours per week for 3 months is 25% employed.

0 = 60% or more or "not applicable" includes: the totally and permanently disabled, the retired, persons supported by other.

1 = 40% - 59%



2 = Under 40% or offenders receiving W-2.

NOTE: Welfare or W-2 recipients must score 2

Alcohol Usage Problems

0 = No alcohol abuse, no interference with functioning. Can't be used for OWI, when alcohol involved in the present offense, or if the offender is an admitted or diagnosed alcoholic.

1 = Gets "drunk" by own definition twice a month or more; some dysfunction when drinking (whether or not "drunk") with family, work, socially, etc. History of alcohol abuse or treatment but no current abuse. An offender with 1 OWI conviction.

2 = One or more of the following circumstances exist:

- Has withdrawal symptoms (physical or psychological) if stops drinking.
- Has physical symptoms of alcoholism, e.g., memory lapses, black outs, passing out.
- Presently involved in inpatient or outpatient treatment.
- Has serious dysfunction at work, e.g., fired, fights with coworkers or supervisors or customers, absenteeism.
- Has alcohol related family problems, e.g., becomes violent, neglectful, abusive toward spouse, children, parents, can't pay bills, separation.
- Has 2 or more OWI.
- Present offense or any arrest within past five years involved alcohol before or during the offense.

Note: If alcohol was used at the time of the offense score must be a 2.

If offender has been convicted once for OWI score must be at least 1.

If offender has been convicted more than once for OWI score must be 2.

Scores in this category must correlate to the scores in the Alcohol Usage category of the Needs Scale, such as:

0 in Risk Assessment score should = 0 in Needs Assessment score
1 in Risk Assessment score should = 3 in Needs Assessment score
2 in Risk Assessment score should = 6 in Needs Assessment score

Other Drug Usage Problems

0 = Offender has no history of drug use except appropriate use of prescribed medication.

Includes those who may have experimented (tried 1 or 2 times) with any drug.

1 = Offender who has a history of using drugs more than once or twice, but not currently using on a regular basis, (i.e., not more than once a month).

Offender has prior conviction or deferred judgment for simple possession of any controlled substance

History of abuse, or treatment, but none currently.

2 = Offender who admits to currently using (more than once within last 30 days) any illicit drugs.

Offender has received treatment within the last 12 months for abusing prescribed medication, or current conviction involves prescription drugs.

Offender whose current conviction is for possession of any illicit drug.

Includes offender who has been convicted of delivery or possession with intent to deliver of any drug.

Presently involved in in-patient or out-patient AODA treatment.

NOTE: If drugs were used at the time of the offense score must be 2. Scores in this category must correlate to the score in the Other Drug use category on the Needs Scale, such as.

0 in Risk Assessment score should = 0 in Needs Assessment score
1 in Risk Assessment score should = 3 in Needs Assessment score
2 in Risk Assessment score should = 5 in Needs Assessment score

Attitude

0 = Past behavior supports positive attitude (goes to job interviews, previously registered for school, has job service card, parolees have completed programs within the institution, lack of conduct reports) MR parolee's tend not to fit category.

Accepts responsibility for offense, accepts probation/parole rules. Remorse for victim. Willingness to change.

1 = Objects to certain probation/parole rules; denies need for help and won't recognize a problem obvious to agent. Appears and/or sounds sophisticated but presents self as helpless; "everyone's picking on me."

Rationalizes criminal behavior

Manipulative; finds excuses to fail to follow agent's directive to avoid its intention, e.g., drops urine specimens sporadically rather than on a consistent schedule.

Insists on innocence after pleading guilty; or blames others.

Has no intention to change irresponsible and/or dependent lifestyle or values, e.g., would rather continue to be supported by welfare or W-2, mother or boy/girl friend than become legally employed when court obligations are owing.

Becomes hostile, defiant, or belligerent during interview.

Age at First Conviction (or Juvenile Adjudication)

Juvenile adjudication means a finding or delinquency by a judge. Informal dispositions by police or social services agencies, such as referrals to group homes or informal juvenile probation supervision, are not adjudication's.

Adult convictions include:

- Probation without conviction marijuana cases (s.961.47 & s.961.48).
- Expunged cases.

Do not include routine traffic convictions such as speeding, etc.

Age at Placement on Community Supervision

For persons undergoing a risk assessment in an institution setting, calculate age at anticipated release date.

For persons undergoing risk assessment upon intake to field supervision, use the person's current age.

Number of Prior Periods of Probation/Parole/ES Supervision (Adult or Juvenile)

Include any period of supervision as a result of an adjudication or the definition of conviction included in the Age of First Conviction item (see below).

Exclude:

- Successful deferred prosecution arrangements
- CHIP's Child in need of protection or services
- Informal juvenile dispositions

Adult convictions include:

- Probation without conviction marijuana cases (s.961.47 & s.961.48).
- Expunged cases.

Do not include routine traffic convictions such as speeding, faulty equipment, etc.

Number of Prior Probation/Parolee/ES Revocations (Adult or Juvenile)

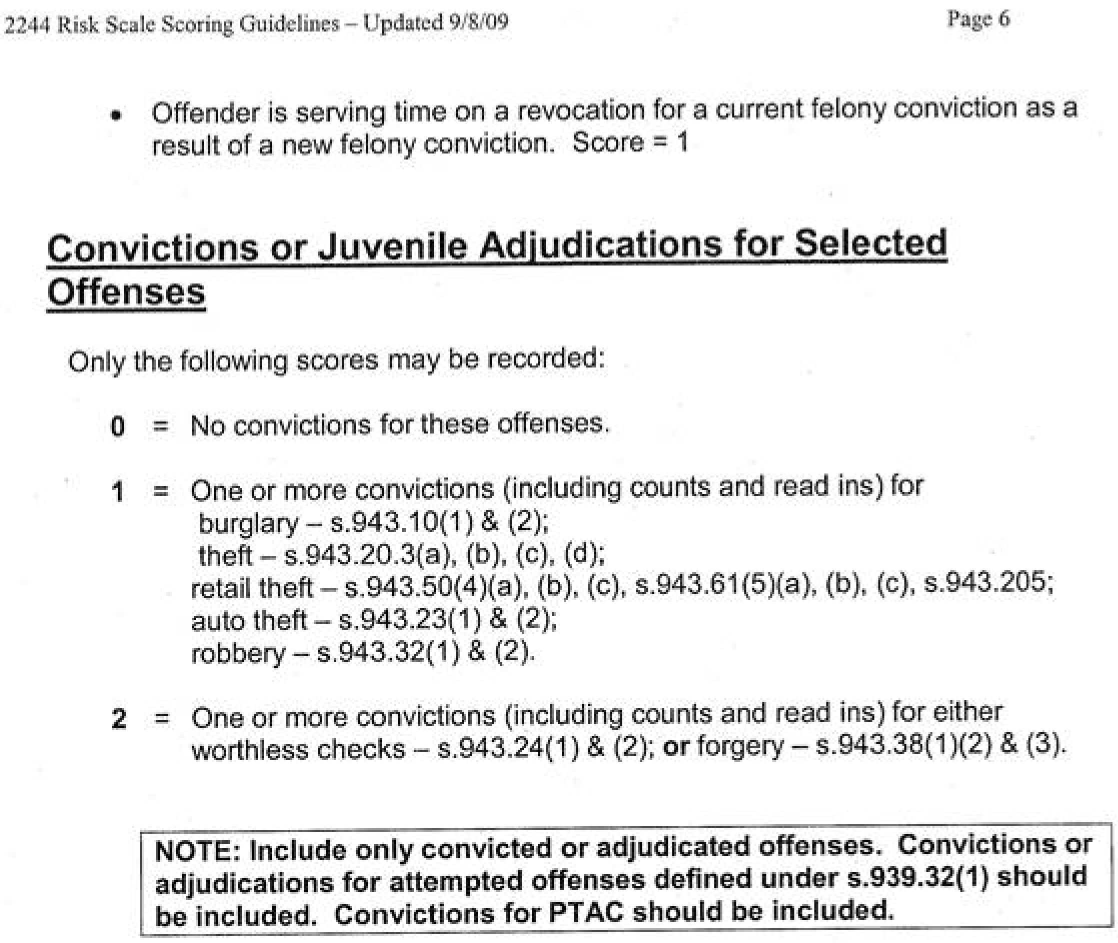
Count only revocations of formal supervision included in the Number of Prior Periods of Probation/Parole Supervision item.

If currently in prison as a result of a revocation, **include** that as a prior revocation.

Number of Prior Felony Convictions (or Juvenile Adjudications)

The most recent offense is considered the present offense and is not counted. All other felony convictions or adjudications, including counts and read-ins which are part of current conviction but occurred earlier in time, are priors.

- Offender is on supervision or serving time on a felony conviction and has no priors. Score = 0
- Offender has a prior felony conviction, and is currently on supervision or serving time on another felony conviction. Score = 1
- Offender is on supervision or serving time on a felony conviction with several felony counts or readins. Score = 1



- Offender is serving time on a revocation for a current felony conviction as a result of a new felony conviction. Score = 1

Convictions or Juvenile Adjudications for Selected Offenses

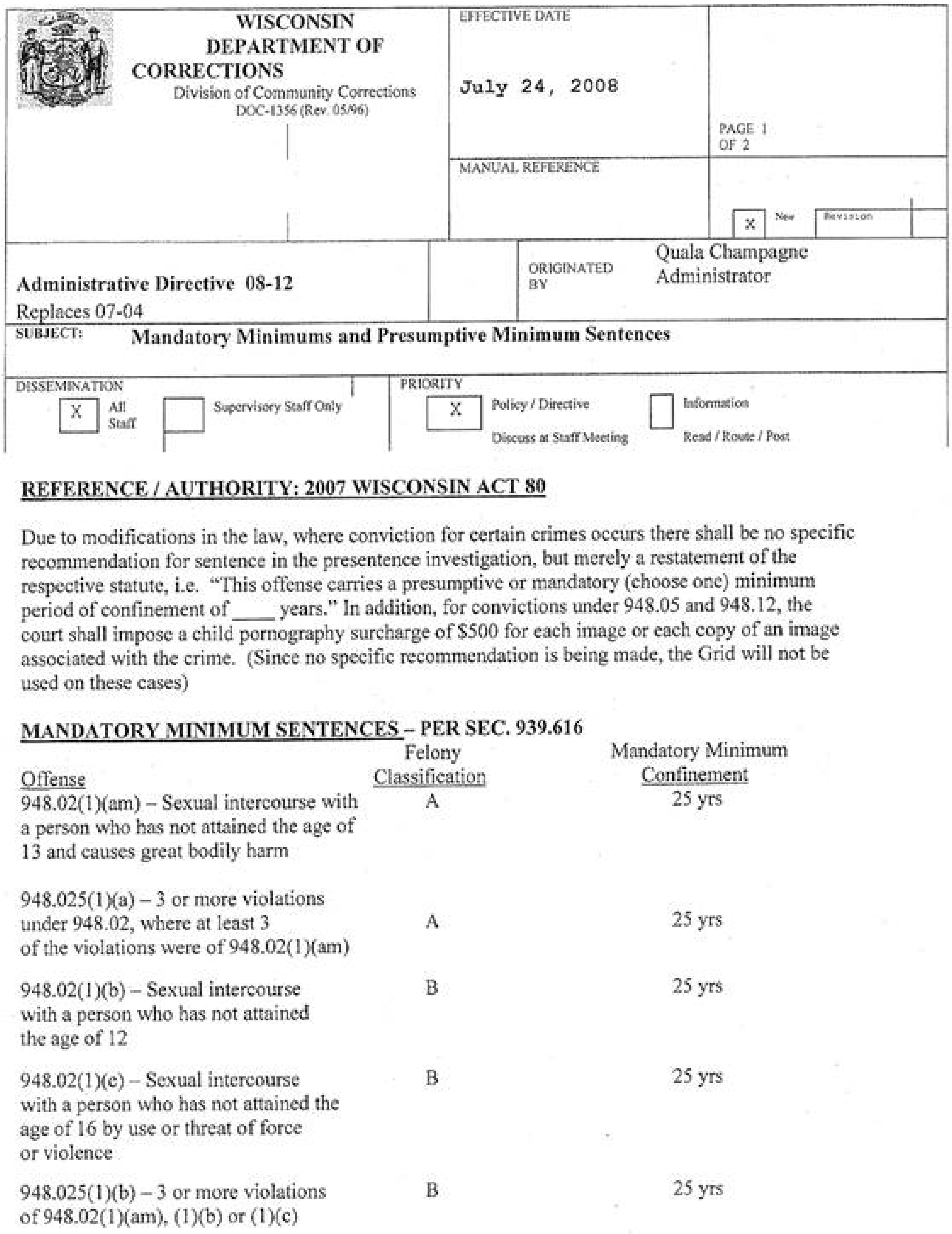
Only the following scores may be recorded:

0 = No convictions for these offenses.

1 = One or more convictions (including counts and read ins) for
burglary – s.943.10(1) & (2);
theft – s.943.20.3(a), (b), (c), (d);
retail theft – s.943.50(4)(a), (b), (c), s.943.61(5)(a), (b), (c), s.943.205;
auto theft – s.943.23(1) & (2);
robbery – s.943.32(1) & (2).

2 = One or more convictions (including counts and read ins) for either worthless checks – s.943.24(1) & (2); **or** forgery – s.943.38(1)(2) & (3).

NOTE: Include only convicted or adjudicated offenses. Convictions or adjudications for attempted offenses defined under s.939.32(1) should be included. Convictions for PTAC should be included.



WISCONSIN DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1356 (Rev. 05/96)

EFFECTIVE DATE
July 24, 2008

PAGE 1
OF 2

MANUAL REFERENCE

☒ New ☐ Revision

Administrative Directive 08-12
Replaces 07-04

ORIGINATED BY
Quala Champagne
Administrator

SUBJECT: **Mandatory Minimums and Presumptive Minimum Sentences**

DISSEMINATION
☒ All Staff ☐ Supervisory Staff Only

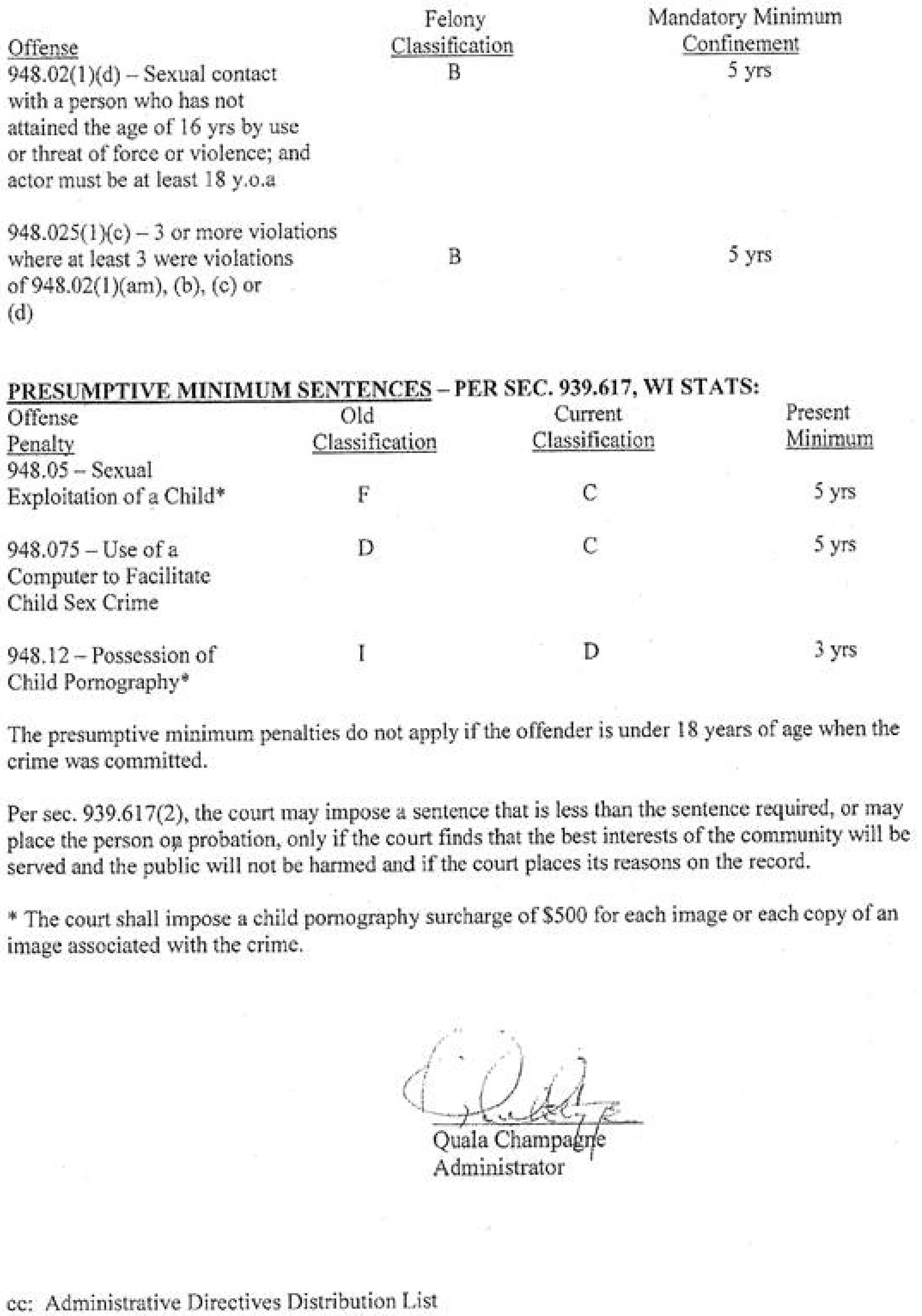
PRIORITY
☒ Policy / Directive
Discuss at Staff Meeting
☐ Information
Read / Route / Post

REFERENCE / AUTHORITY: 2007 WISCONSIN ACT 80

Due to modifications in the law, where conviction for certain crimes occurs there shall be no specific recommendation for sentence in the presentence investigation, but merely a restatement of the respective statute, i.e. "This offense carries a presumptive or mandatory (choose one) minimum period of confinement of ____ years." In addition, for convictions under 948.05 and 948.12, the court shall impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime. (Since no specific recommendation is being made, the Grid will not be used on these cases)

MANDATORY MINIMUM SENTENCES – PER SEC. 939.616

Offense	Felony Classification	Mandatory Minimum Confinement
948.02(1)(am) – Sexual intercourse with a person who has not attained the age of 13 and causes great bodily harm	A	25 yrs
948.025(1)(a) – 3 or more violations under 948.02, where at least 3 of the violations were of 948.02(1)(am)	A	25 yrs
948.02(1)(b) – Sexual intercourse with a person who has not attained the age of 12	B	25 yrs
948.02(1)(c) – Sexual intercourse with a person who has not attained the age of 16 by use or threat of force or violence	B	25 yrs
948.025(1)(b) – 3 or more violations of 948.02(1)(am), (1)(b) or (1)(c)	B	25 yrs



Offense	Felony Classification	Mandatory Minimum Confinement
948.02(1)(d) – Sexual contact with a person who has not attained the age of 16 yrs by use or threat of force or violence; and actor must be at least 18 y.o.a	B	5 yrs
948.025(1)(c) – 3 or more violations where at least 3 were violations of 948.02(1)(am), (b), (c) or (d)	B	5 yrs

PRESUMPTIVE MINIMUM SENTENCES – PER SEC. 939.617, WI STATS:

Offense Penalty	Old Classification	Current Classification	Present Minimum
948.05 – Sexual Exploitation of a Child*	F	C	5 yrs
948.075 – Use of a Computer to Facilitate Child Sex Crime	D	C	5 yrs
948.12 – Possession of Child Pornography*	I	D	3 yrs

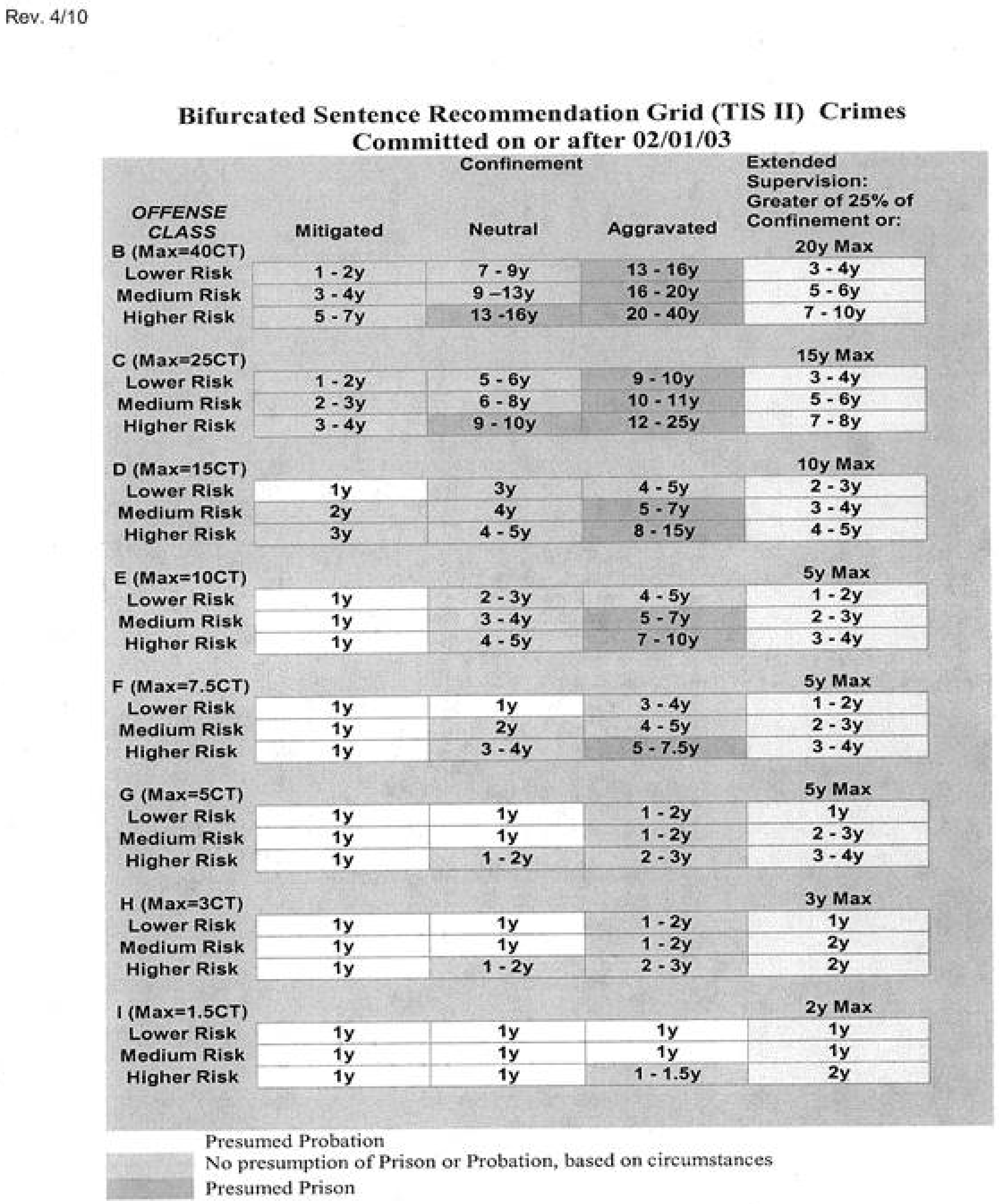
The presumptive minimum penalties do not apply if the offender is under 18 years of age when the crime was committed.

Per sec. 939.617(2), the court may impose a sentence that is less than the sentence required, or may place the person on probation, only if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.

* The court shall impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime.

Quala Champagne
Administrator

cc: Administrative Directives Distribution List



Rev. 4/10

Bifurcated Sentence Recommendation Grid (TIS II) Crimes Committed on or after 02/01/03

	Confinement			Extended Supervision: Greater of 25% of Confinement or:
OFFENSE CLASS	Mitigated	Neutral	Aggravated	
B (Max=40CT)				**20y Max**
Lower Risk	1 - 2y	7 - 9y	13 - 16y	3 - 4y
Medium Risk	3 - 4y	9 –13y	16 - 20y	5 - 6y
Higher Risk	5 - 7y	13 -16y	20 - 40y	7 - 10y
C (Max=25CT)				**15y Max**
Lower Risk	1 - 2y	5 - 6y	9 - 10y	3 - 4y
Medium Risk	2 - 3y	6 - 8y	10 - 11y	5 - 6y
Higher Risk	3 - 4y	9 - 10y	12 - 25y	7 - 8y
D (Max=15CT)				**10y Max**
Lower Risk	1y	3y	4 - 5y	2 - 3y
Medium Risk	2y	4y	5 - 7y	3 - 4y
Higher Risk	3y	4 - 5y	8 - 15y	4 - 5y
E (Max=10CT)				**5y Max**
Lower Risk	1y	2 - 3y	4 - 5y	1 - 2y
Medium Risk	1y	3 - 4y	5 - 7y	2 - 3y
Higher Risk	1y	4 - 5y	7 - 10y	3 - 4y
F (Max=7.5CT)				**5y Max**
Lower Risk	1y	1y	3 - 4y	1 - 2y
Medium Risk	1y	2y	4 - 5y	2 - 3y
Higher Risk	1y	3 - 4y	5 - 7.5y	3 - 4y
G (Max=5CT)				**5y Max**
Lower Risk	1y	1y	1 - 2y	1y
Medium Risk	1y	1y	1 - 2y	2 - 3y
Higher Risk	1y	1 - 2y	2 - 3y	3 - 4y
H (Max=3CT)				**3y Max**
Lower Risk	1y	1y	1 - 2y	1y
Medium Risk	1y	1y	1 - 2y	2y
Higher Risk	1y	1 - 2y	2 - 3y	2y
I (Max=1.5CT)				**2y Max**
Lower Risk	1y	1y	1y	1y
Medium Risk	1y	1y	1y	1y
Higher Risk	1y	1y	1 - 1.5y	2y

☐ Presumed Probation
▒ No presumption of Prison or Probation, based on circumstances
▓ Presumed Prison

Appendix C

Wisconsin Circuit Court Fee, Forfeiture, Fine and Surcharge Tables (CRM-0173)

Note: The most up-to-date Wisconsin Circuit Court Fee, Forfeiture, Fine and Surcharge Tables can be found at https://www.wicourts.gov/courts/circuit/docs/fees.pdf.

WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES

Updated April 26, 2024

Table 1: Filing fees - cost to file civil actions and other fees of the clerk of circuit court

Table 2: Civil forfeiture table - fees and surcharges for non-criminal offenses in circuit court

Table 3: Criminal fine table - fees and surcharges for criminal offenses in circuit court

Table 4: Surcharge table - description of court fees and surcharges, when they apply, and where the funds go

How to read tables 2 and 3

The left-hand column shows the amount of the base forfeiture or fine to be imposed. The total column shows the base amount plus the surcharges that apply in every case. The remaining columns show the effect of certain additional surcharges.

In table 2, a forfeiture of $5 results in a total of $143.80. If the offense is also subject to the natural resources surcharge, the final total of $147.55 shows in the appropriate column. In Milwaukee, another $3.50 is added for the Milwaukee special prosecution clerks surcharge.

In table 3, a fine of $10 results in a total of $465.60 for a misdemeanor and $540.60 for a felony. If the offense is also subject to certain additional surcharges, the amount to be added is shown in the right-hand columns.

Notes to the tables

1. The summaries and tables are intended as guidance and do not replace the statutes as the source of authority. Court costs and fees are set out primarily in ch. 814 of the Wisconsin Statutes. The surcharges are listed in 814.75.

2. When a fine or forfeiture is suspended in whole or in part, the following surcharges are reduced proportionately: commercial fish protection, consumer protection, environmental, fishing net removal, fishing shelter removal, jail, natural resources, natural resources restitution, penalty, railroad crossing improvement, snowmobile registration restitution, supplemental food enforcement, truck driver education, uninsured employer, weapons, wild animal protection, wildlife violator compact.

3. The following surcharges are imposed for each count: clerk fees, crime lab and drug law enforcement, crime prevention funding board, domestic abuse program improvement, drug offender diversion, GPS tracking, jail, supplemental food enforcement, truck driver education, victim-witness, wild animal protection.

4. If restitution is ordered under 973.20, the court shall order payment of a 10% surcharge on the amount of restitution, 973.06(1)(g), and a 5% surcharge on the total amount of restitution, costs, attorney fees, fines and surcharges, including the 10% surcharge, 973.20(11)(a).

5 Certain offenses are subject to fewer costs:
   - For safety belt violations, smoking violations, and disability ID card vioaltions, the clerk's fee is not imposed. The only surcharge is truck driver education surcharge if applicable.
   - For non-moving traffic violations, the clerk's fee is imposed. The only surcharges are court support services and justice information.
   - For failure to carry proof of insurance under 344.62(2), no clerk's fee or surcharges are imposed.
   - For smoking offenses, the only surcharges are justice information and court support services.

6. Electronically filed cases are subject to a fee of $35 per case per party, $70 for attorney-mediators (effective May 1, 2024).

WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Appeal			
from municipal court			
on the record or by certiorari, 814.61(8)(am)1.	$129.50[e]	30601	$40 filing fee, $68 CSS, $21.50 JINFO
new trial, 814.61(8)(am)2.	$144.50[e]	30601	$55 filing fee, $68 CSS, $21.50 JINFO
from administrative decision			
on the record or by certiorari, 814.61(8)(am)1.	$129.50[e]	30607	$40 filing fee, $68 CSS, $21.50 JINFO
new trial, 814.61(8)(am)2.	$144.50[e]	30607	$55 filing fee, $68 CSS, $21.50 JINFO
from circuit court to court of appeals - civil appeal			
transmittal fee retained by circuit court, 814.61(9)	$15+		$15 plus postage
filing fee forwarded to appellate court, 809.25(2)(a)1., 814.64	$195		no filing fee for state agencies
workers comp and unemployment appeals, ch. 102.26(1), 108.09(7)	0	30607	no fee, see OAG 34-87
Arbitration			
appointment of arbitrator, 788.04(2)(a)	0		
compel, confirm, modify, vacate arbitrators award, 814.61(1)	$164.50[e]	30703	$75 filing fee, $68 CSS, $21.50 JINFO
arbitration re purchase of real property, 799.01(1)(cm), 814.62(3)	$94.50[e]	31006	$22 filing fee, $51 CSS, $21.50 JINFO
Certificates			
issuing certificate, execution, commission, writ not commencing an action, 814.61(5)(am)	$5		
certifying copies, 814.61(5)(a), 814.61(10)(a), OAG 4-84 includes attestation & comparison	5+		$5 to certify the document, plus $1.25 per page to copy
certifying & transmitting documents, 814.61(9) includes appeals, changes of venue, foreign judgments	$15+		$15 plus postage

CSS = court support services surcharge, 814.85: $51 for claims $10,000 or less, $169 for claims over $10,000, $68 for claims other than money judgments.

*JINFO = justice information surcharge, 814.86(1) & (1m): $21.50; for fees that include the JINFO, add $3.50 in Milwaukee.

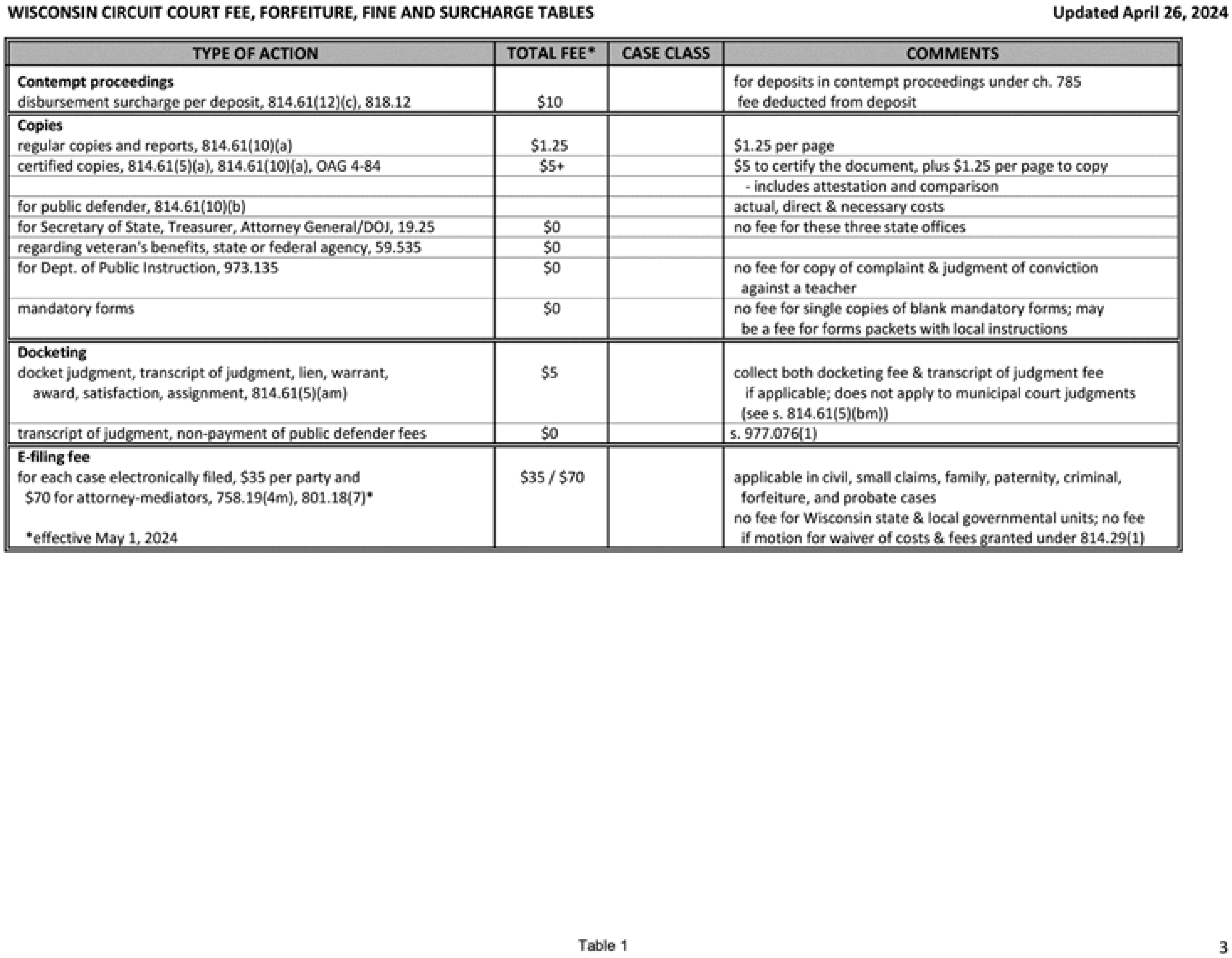
[e] For electronically filed cases, add $35 per case per party unless exemptions apply; $70 for attorney-mediators (effective May 1, 2024).

Table 1

WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Civil action			
claim for money judgment greater than $10,000, 814.61(1)(a)	$265.50 [e]	30100-08 30301, 03, 04 30201, 30404 30405	$75 filing fee, $169 CSS, $21.50 JINFO includes foreclosure
cross-claim	$0		
personal injury or tort claim $5000 or less, 799.01(1)(cr), 814.61(1)(a) - open as small claims, not civil	$94.50 [e]		open as Small Claims (SC); $22 filing fee, $51 CSS, $21.50 JINFO money judgments include personal injury/property damage even if amount not specified, 802.02(1m)
personal injury or tort claim greater than $5000 up to $10,000, 814.61(1)(a)	$147.50 [e]	30100-08 30201	open as Civil (CV); $75 filing fee, $51 CSS, $21.50 JINFO
personal injury or tort claim greater than $10,000, 814.61(1)(a)	$265.50 [e]	30100-08 30201	open as Civil (CV); $75 filing fee, $169 CSS, $21.50 JINFO
taxing authority: permissive use of civil procedures for claims $10,000 or less, 799.01(2), 814.85(1)	$147.50 [e]	30301	$75 filing fee, $51 CSS, $21.50 JINFO or small claims fees: $22 filing fee, $51 CSS, $21.50 JINFO
no money judgment, 814.61(1)(a) includes name change, declaratory judgment, mandamus, habeas corpus, minor settlements, vital statistics amendments after one year and delayed registrations	$164.50 [e]	30203 30405 30701-08 30950-56	$75 filing fee, $68 CSS, $21.50 JINFO
petition for writ of certiorari, 814.61(8)(am)1., 801.02(5)	$129.50 [e]	30955	if petitioner requests review of administrative decision, treat as administrative appeal above
petition to require DNA sample, 165.76(6), 814.61(1)(c)7.	$0	30703	
motion costs, 814.07	$0-$300		amount set in discretion of court, see OAG 1-00
motion to intervene, 803.09	$0		
jury fee, 814.61(4)	$36-72		$6 per juror requested
third-party complaint			
claim $5000 or less, 814.61(3), 799.01(1)(cr), open as small claims	$117.50 [e]		open as SC; $45 filing fee, $51 CSS, $21.50 JINFO, 1 fee/action
claim over $5000 up to $10,000, 814.61(3), 799.01(1)(cr)	$117.50 [e]		open as CV; $45 filing fee, $51 CSS, $21.50 JINFO, 1 fee/action
claim over $10,000, 814.61(3), 799.01(1)(cr)	$235.50 [e]		open as CV; $45 filing fee, $169 CSS, $21.50 JINFO, 1 fee/action
no money judgment	$134.50 [e]		$45 filing fee, $68 CSS, $21.50 JINFO
Condemnation appeals			
on the record or by certiorari, 814.61(8)(am)1., 32.61	$129.50 [e]	30402	$40 filing fee, $68 CSS, $21.50 JINFO
new trial, 814.61(8)(am)2.	$144.50 [e]	30402	$55 filing fee, $68 CSS, $21.50 JINFO

Table 1



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES

Updated April 26, 2024

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Contempt proceedings			
disbursement surcharge per deposit, 814.61(12)(c), 818.12	$10		for deposits in contempt proceedings under ch. 785 fee deducted from deposit
Copies			
regular copies and reports, 814.61(10)(a)	$1.25		$1.25 per page
certified copies, 814.61(5)(a), 814.61(10)(a), OAG 4-84	$5+		$5 to certify the document, plus $1.25 per page to copy
			- includes attestation and comparison
for public defender, 814.61(10)(b)			actual, direct & necessary costs
for Secretary of State, Treasurer, Attorney General/DOJ, 19.25	$0		no fee for these three state offices
regarding veteran's benefits, state or federal agency, 59.535	$0		
for Dept. of Public Instruction, 973.135	$0		no fee for copy of complaint & judgment of conviction against a teacher
mandatory forms	$0		no fee for single copies of blank mandatory forms; may be a fee for forms packets with local instructions
Docketing			
docket judgment, transcript of judgment, lien, warrant, award, satisfaction, assignment, 814.61(5)(am)	$5		collect both docketing fee & transcript of judgment fee if applicable; does not apply to municipal court judgments (see s. 814.61(5)(bm))
transcript of judgment, non-payment of public defender fees	$0		s. 977.076(1)
E-filing fee			
for each case electronically filed, $35 per party and $70 for attorney-mediators, 758.19(4m), 801.18(7)* *effective May 1, 2024	$35 / $70		applicable in civil, small claims, family, paternity, criminal, forfeiture, and probate cases no fee for Wisconsin state & local governmental units; no fee if motion for waiver of costs & fees granted under 814.29(1)

Table 1

WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Family action commence action, 814.61(1)(a) & (b)		40101, 40201 40503, 40803	divorce, annulment, legal separation, acknowledgment of paternity
with no request for support or maintenance	$184.50 [e]		$75 filing fee, $68 CSS, $21.50 JINFO, $20 family court counseling services (FCCS) fee under 767.405, 814.61(1)(b)
with request for support or maintenance	$194.50 [e]		$10 fee for parties not receiving public assistance 814.61(13)
action by child support agency, 814.61(1)(c)1.	$194.50 [e]		fee waived only for paternity cases and ch. 769
third-party petition for title to property	$0		no fee if third party requests declaratory judgment
enforce legal custody, physical placement, or visitation order	$0	40601	no fee for enforcement motions, 767.471(3)(e), 785.03
in existing family action before judgment	$0		no fee for motion in existing family action
new action under ch. 767	$184.50 [e]		$75 filing fee, $20 FCCS, $68 CSS, $21.50 JINFO
post-judgment motion, 814.61(7)(a)	$30		
grandparent or stepparent visitation			
in existing family action before judgment, 767.43	$0		no fee for motion in existing family action
new grandparent visitation action under ch. 767	$184.50 [e]	40803	$75 filing fee, $20 FCCS, $68 CSS, $21.50 JINFO
post-judgment motion, 814.61(7)(a)	$30		No fee if stipulated, 814.61(7)(a)
in new or pending guardianship, 48.9795(12), 814.61(13m)	$60	50305	
mediation fee, 814.615(1)(a)1. & 2.	$200		$200 or local fee, first session free, under 767.405(5)
out of county orders file out-of-county judgment, 767.281, 814.61(5)(b)	$5		$10 to file transcript of judgment; regular fees apply to later motions; no fee for protective orders
out of state orders child support UIFSA action, 814.61(1)(c)2., 769.313	$0		no fee to register & enforce out-of-state support orders
out-of-state divorce judgment, 814.61(6), 806.24	$15		foreign judgment filing fee; regular fees apply to later mtns
out-of-state custody judgment under UCCJEA, ch. 822, 814.61(6), 822.35(2)(a)	$15		$15 to file foreign judgment; regular fees apply to later motions
out-of-state protective order	$0		no fee for protective orders, s. 813.128(3g)(a)1.
parental consent to minor's abortion, waiver of, 48.257(6)	$0		no fee
paternity commence action by private party, 814.61(1)(a)	$184.50 [e]	40501	$75 filing fee, $20 FCCS, $68 CSS, $21.50 JINFO
with request for support, 814.61(13)	$194.50 [e]		$10 fee for parties not on public assistance, 814.61(13)
action by state, ch. support agency, GAL, 814.61(1)(c)	$0		no fee, including voluntary acknowledgment of paternity
voluntary acknowledgment of paternity by private party, 767.805	$184.50 [e]	40503	open as a family case

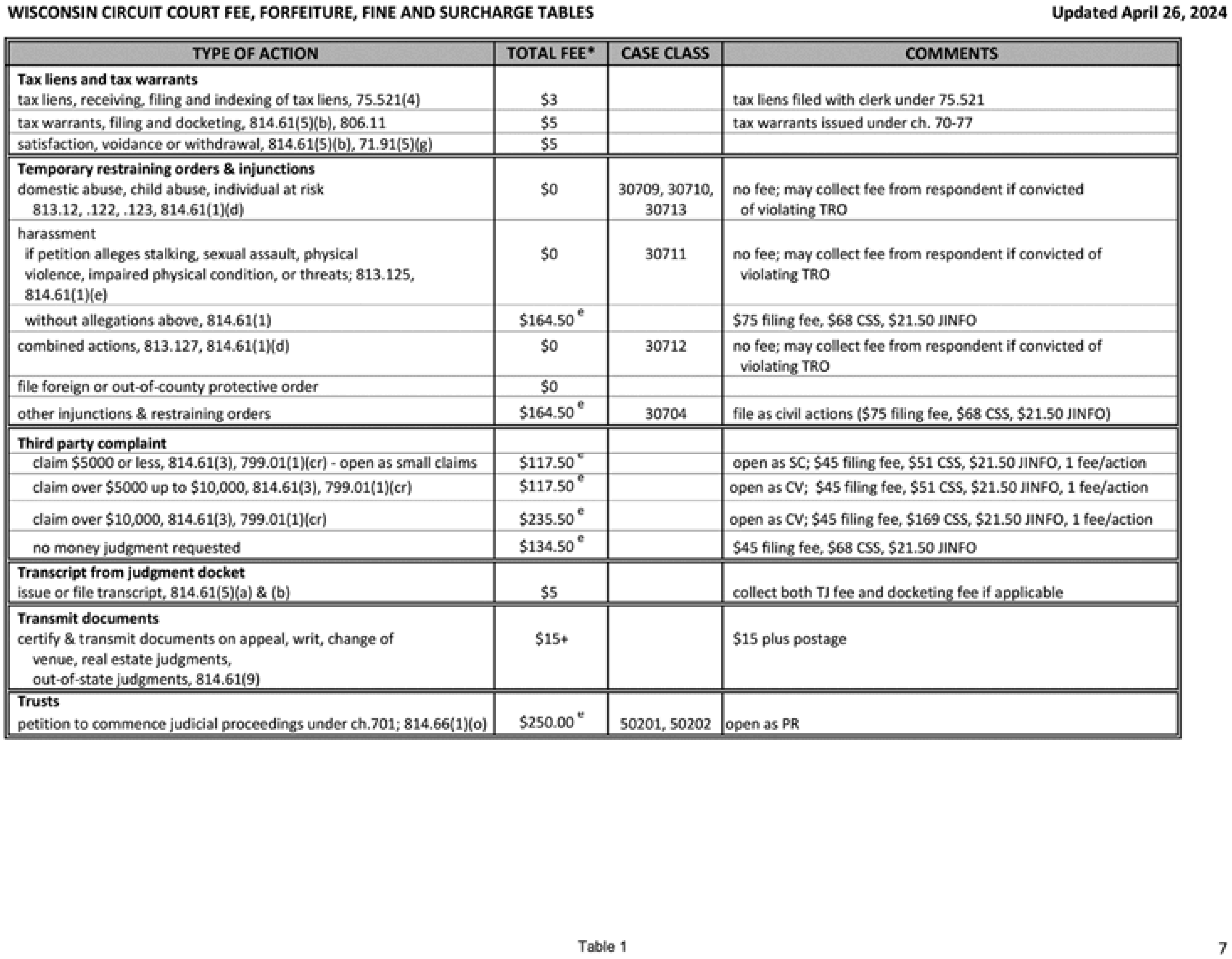
Table 1

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Family action, continued			
revision of judgment			
legal custody or physical placement, 814.61(7)(b)	$50	40601	revisions under 767.451, 767.481
judgments other than custody or placement, 814.61(7)(a)	$30		includes revision of child support under 767.59
by stipulation, 814.61(7)(a)	$0		no fee
paternity, 814.61(7)(c)	$0		no motion fee for child support agency, state, GAL, or court-appointed attorney under 767.407(1)(c)1.&2; or Ch. 769
study re legal custody & physical placement, 814.615(1)(a)3.	$300		$300 or local fee for study under 767.405(14)
support or maintenance, 767.501, 767.56, 767.57	$0	40402	no fee for support/maint. with no request divorce/paternity
Foreclosure under ch. 846	$265.50 [e]	30404	$75 filing fee, $169 CSS, $21.50 JINFO
Forfeiture, complex			
action for environmental damage, consumer protection, or other significant violation of the public interest	$0	30109	open as CX case with no fee; civil procedures apply; forfeiture schedule available
Forfeiture of property			
action to seize vehicle, drugs, or other property used in crime under 973.075-077, 961.55-.56, 814.61(1)(c)3.	$0		no filing fee
Garnishment			
amount greater than $10,000, 814.62(1), ch. 812	$210.50 [e]	30302	per debtor: $20 filing fee, $169 CSS, $21.50 JINFO
amount $10,000 or less, 814.62(1), ch. 812	$92.50 [e]	31005	per debtor: $20 filing fee, $51 CSS, $21.50 JINFO
garnishment of restitution, 814.62(1)	$0		no fee for garnishment of restitution
Judgments & liens			
file foreign judgment (FJ), 814.61(6), 806.24	$15		from other states, tribal courts, federal outside WI
file foreign protective order, 814.61(1)(c)(d), 42 USC 3796gg-5	$0		
file transcript of judgment (TJ), 814.61(5)(am), 806.12 - 806.17	$5		judgments from other WI circuit courts, WI appellate, own-county municipal, WI federal
issue transcript from judgment & lien docket, 814.61(5)	$5		
docket judgment, FJ, TJ, lien, warrant, satisfaction, writ, execution, assignment, 814.61(5)(am)	$5		no fee to file protective orders collect both FJ/TJ filing fee & docketing fee if applicable
			Note: no fee for entry of judgments from municipal court into the judgment and lien docket, 814.61(5)(bm)
reopen default judgment, 814.07, 345.37(1)(b)	$0 - $300		amount set in discretion of court, see OAG 1-00
Juvenile			
adoption, 814.61(1)(c)4.	$0		no fee
terminate parental rights, 814.61(1)(c)4.	$0		no fee

Table 1

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Minor settlements			
petition to approve minor settlement, 807.10	$164.50 ^{e}	30203	$75 filing fee, $68 CSS, $21.50 JINFO
receive, handle, or deposit funds, 807.10(3), 814.61(12)(a)1.			greater of $10 or .5% of funds deposited with clerk
withdraw funds, per transaction, 814.61(12)(a)1.	$10		$10 per transaction
Name change			
file name change, 786.36-37	$164.50 ^{e}	30708	$75 filing fee, $68 CSS, $21.50 JINFO
name change in paternity action, new-767.89(3m)	0		name change may be part of paternity action
Occupational drivers license petition file petition, 343.10(4), 351.07(1g), 814.61(14)	$40	30607	Note: the DMV license issuance fee is $10 under 343.21(1)(n) for a total of $50 for an occupational license
Probate inventory fee, 814.66(1)(a)2.	$20 min. or 0.2% of value over $10,000		Note: inventory fees are not paid when the case is filed, but when the inventory is filed.
inventory fee in minor guardianship of the estate or adult guardianship of the estate, 814.66(1)(b)2.	$20 min. or 0.2% of value over $50,000	50304 50301	(eFiling fee applies to probate cases)
Receiving & disbursing money receive trust fund, handle or deposit money under 757.25, 807.10(3), or 54.12(1)(a), 814.61(12), 814.66(1)(n)	$10+		greater of $10 or .5% of funds deposited with clerk includes general deposits, minor settlements, trust funds, small estates, conservator accounts
withdraw funds, per transaction, 814.61(12)(a)1.	$10		$10 per transaction
contempt proceedings, deposits, 814.61(12)(c)	$10		$10 per transaction
Searches search file or record to locate any one action, 814.61(11)	$5		per action, when no case number is provided
Small claims			
commence action $10,000 or less, 814.62(3)(a), 799.01 - except tort/personal injury	$94.50 ^{e}	31001-04 31006	$22 filing fee, $51 CSS, $21.50 JINFO; includes evictions, replevin, arbitration, forfeitures, actions $10,000 or less Consolidated claim of multiple creditors = single action
commence action $5000 or less - tort/personal injury, 799.01(1)(cr)	$94.50 ^{e}	31010	$22 filing fee, $51 CSS, $21.50 JINFO
cross-claim or counterclaim over $10,000, 814.62(3)(b)	$125.50 ^{e}		$53 filing fee, $51 CSS, $21.50 JINFO
third-party complaint $5000 or less, 814.61(3), 799.01(1)(cr)	$117.50 ^{e}		$45 filing fee, $51 CSS, $21.50 JINFO
demand for jury trial, 814.62(3)(e), 814.61(4)	$89		$53 for jury demand, plus jury fee of $36
service by mail, 814.62(4)	$2+		$2 per defendant, plus postage if sent by certified mail
Subpoena			
out of state subpoena to depose WI resident, 887.24(4)	$0		
in-state subpoena, 885.01(1)	$0		

Table 1



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Tax liens and tax warrants			
tax liens, receiving, filing and indexing of tax liens, 75.521(4)	$3		tax liens filed with clerk under 75.521
tax warrants, filing and docketing, 814.61(5)(b), 806.11	$5		tax warrants issued under ch. 70-77
satisfaction, voidance or withdrawal, 814.61(5)(b), 71.91(5)(g)	$5		
Temporary restraining orders & injunctions			
domestic abuse, child abuse, individual at risk 813.12, .122, .123, 814.61(1)(d)	$0	30709, 30710, 30713	no fee; may collect fee from respondent if convicted of violating TRO
harassment if petition alleges stalking, sexual assault, physical violence, impaired physical condition, or threats; 813.125, 814.61(1)(e)	$0	30711	no fee; may collect fee from respondent if convicted of violating TRO
without allegations above, 814.61(1)	$164.50 ^{e}		$75 filing fee, $68 CSS, $21.50 JINFO
combined actions, 813.127, 814.61(1)(d)	$0	30712	no fee; may collect fee from respondent if convicted of violating TRO
file foreign or out-of-county protective order	$0		
other injunctions & restraining orders	$164.50 ^{e}	30704	file as civil actions ($75 filing fee, $68 CSS, $21.50 JINFO)
Third party complaint			
claim $5000 or less, 814.61(3), 799.01(1)(cr) - open as small claims	$117.50 ^{e}		open as SC; $45 filing fee, $51 CSS, $21.50 JINFO, 1 fee/action
claim over $5000 up to $10,000, 814.61(3), 799.01(1)(cr)	$117.50 ^{e}		open as CV; $45 filing fee, $51 CSS, $21.50 JINFO, 1 fee/action
claim over $10,000, 814.61(3), 799.01(1)(cr)	$235.50 ^{e}		open as CV; $45 filing fee, $169 CSS, $21.50 JINFO, 1 fee/action
no money judgment requested	$134.50 ^{e}		$45 filing fee, $68 CSS, $21.50 JINFO
Transcript from judgment docket			
issue or file transcript, 814.61(5)(a) & (b)	$5		collect both TJ fee and docketing fee if applicable
Transmit documents			
certify & transmit documents on appeal, writ, change of venue, real estate judgments, out-of-state judgments, 814.61(9)	$15+		$15 plus postage
Trusts			
petition to commence judicial proceedings under ch.701; 814.66(1)(o)	$250.00 ^{e}	50201, 50202	open as PR

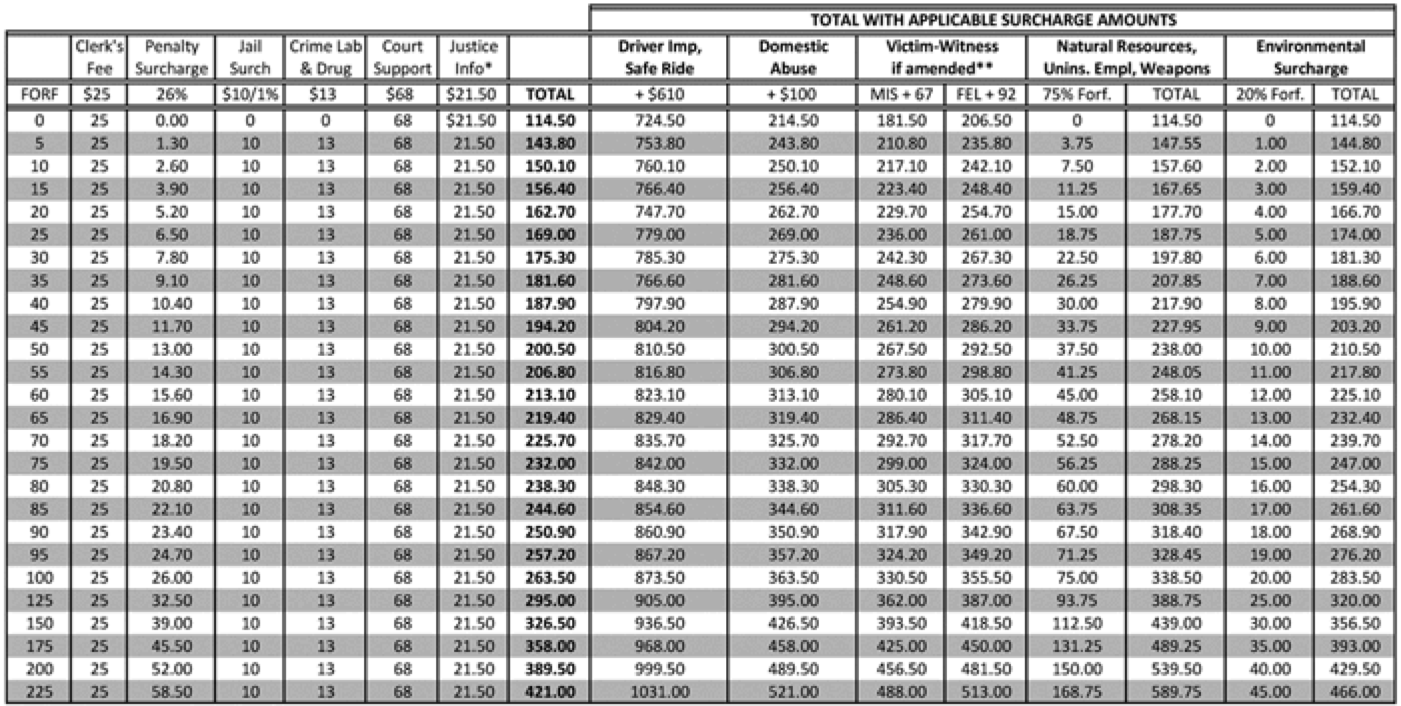
Table 1

7

TYPE OF ACTION	TOTAL FEE*	CASE CLASS	COMMENTS
Venue, change of			
civil, receiving court, 814.61(2)	$75		fee equal to original filing fee, payable by the party that necessitated the change of venue, no CSS or JINFO
transmittal fee, sending court, 814.61(9)	$15+		$15 for transmittal of documents, plus postage
small claims, receiving court, 814.61(2)	$22		
family, receiving court, 814.61(1)(b), (2)	$95		$75 filing fee, $20 family court counseling surcharge
family, receiving court, with request for support or maintenance	$105		$75 filing fee, $20 family court counseling surcharge, $10 under 814.61(13)
discretionary, 801.52, 814.61(2)	$0		no fee
Vital statistics			
amendments after one year and delayed regisration	$164.50 [e]	30708	$75 filing fee, $68 CSS, $21.50 JINFO name, sex change, birth record, death, marriage, surrogate mother NOTE: DHS charges a $10 fee for filing an order amendment, $20 for certified copy, $3/copy for additional copies, 69.22
Wage claim action			
claim against employer for unpaid wages, 109.03(6), 109.11(2) and (3)	Varies		DA may choose to file as small claims, civil or criminal action. For small claims or civil, regular filing fee applies to both individuals and DA.
Wage earner action			
voluntary debt proceeding, 128.21, 814.62(2)	$31.50	31007	$10 filing fee, $21.50 JINFO
Warrants			
tax warrants and liens, *see* tax liens			warrants issued under ch. 70-77
warrants for failure to pay, failure to appear	$0		no clerk's fee; sheriff's fees provided under 814.70
satisfaction, voidance or withdrawal, 814.61(5)(b), 71.91(5)(g)	$5		

WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES

Updated April 26, 2024

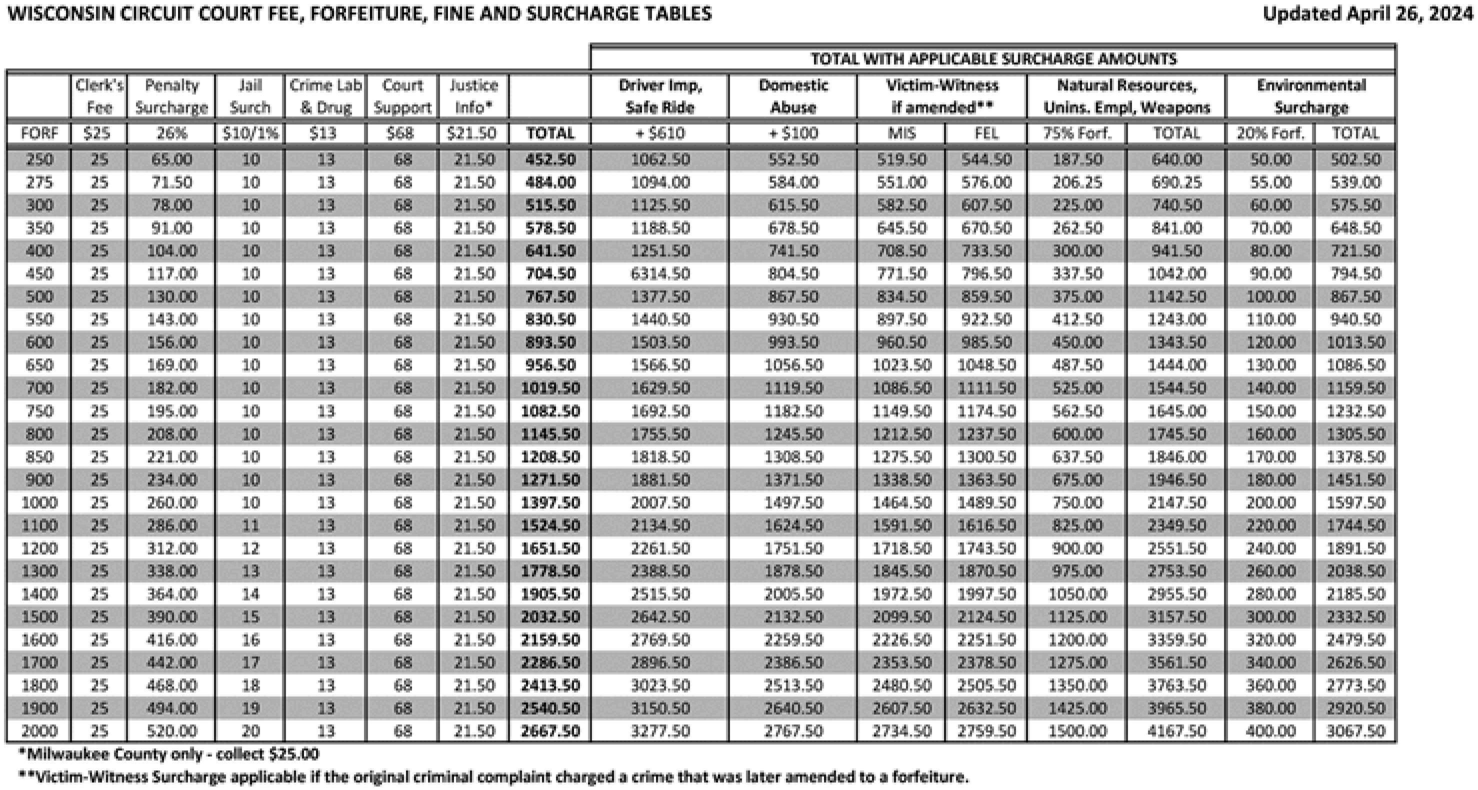


								TOTAL WITH APPLICABLE SURCHARGE AMOUNTS							
	Clerk's Fee	Penalty Surcharge	Jail Surch	Crime Lab & Drug	Court Support	Justice Info*		**Driver Imp, Safe Ride**	**Domestic Abuse**	**Victim-Witness if amended****		**Natural Resources, Unins. Empl, Weapons**		**Environmental Surcharge**	
FORF	$25	26%	$10/1%	$13	$68	$21.50	**TOTAL**	+ $610	+ $100	MIS + 67	FEL + 92	75% Forf.	TOTAL	20% Forf.	TOTAL
0	25	0.00	0	0	68	$21.50	**114.50**	724.50	214.50	181.50	206.50	0	114.50	0	114.50
5	25	1.30	10	13	68	21.50	**143.80**	753.80	243.80	210.80	235.80	3.75	147.55	1.00	144.80
10	25	2.60	10	13	68	21.50	**150.10**	760.10	250.10	217.10	242.10	7.50	157.60	2.00	152.10
15	25	3.90	10	13	68	21.50	**156.40**	766.40	256.40	223.40	248.40	11.25	167.65	3.00	159.40
20	25	5.20	10	13	68	21.50	**162.70**	747.70	262.70	229.70	254.70	15.00	177.70	4.00	166.70
25	25	6.50	10	13	68	21.50	**169.00**	779.00	269.00	236.00	261.00	18.75	187.75	5.00	174.00
30	25	7.80	10	13	68	21.50	**175.30**	785.30	275.30	242.30	267.30	22.50	197.80	6.00	181.30
35	25	9.10	10	13	68	21.50	**181.60**	766.60	281.60	248.60	273.60	26.25	207.85	7.00	188.60
40	25	10.40	10	13	68	21.50	**187.90**	797.90	287.90	254.90	279.90	30.00	217.90	8.00	195.90
45	25	11.70	10	13	68	21.50	**194.20**	804.20	294.20	261.20	286.20	33.75	227.95	9.00	203.20
50	25	13.00	10	13	68	21.50	**200.50**	810.50	300.50	267.50	292.50	37.50	238.00	10.00	210.50
55	25	14.30	10	13	68	21.50	**206.80**	816.80	306.80	273.80	298.80	41.25	248.05	11.00	217.80
60	25	15.60	10	13	68	21.50	**213.10**	823.10	313.10	280.10	305.10	45.00	258.10	12.00	225.10
65	25	16.90	10	13	68	21.50	**219.40**	829.40	319.40	286.40	311.40	48.75	268.15	13.00	232.40
70	25	18.20	10	13	68	21.50	**225.70**	835.70	325.70	292.70	317.70	52.50	278.20	14.00	239.70
75	25	19.50	10	13	68	21.50	**232.00**	842.00	332.00	299.00	324.00	56.25	288.25	15.00	247.00
80	25	20.80	10	13	68	21.50	**238.30**	848.30	338.30	305.30	330.30	60.00	298.30	16.00	254.30
85	25	22.10	10	13	68	21.50	**244.60**	854.60	344.60	311.60	336.60	63.75	308.35	17.00	261.60
90	25	23.40	10	13	68	21.50	**250.90**	860.90	350.90	317.90	342.90	67.50	318.40	18.00	268.90
95	25	24.70	10	13	68	21.50	**257.20**	867.20	357.20	324.20	349.20	71.25	328.45	19.00	276.20
100	25	26.00	10	13	68	21.50	**263.50**	873.50	363.50	330.50	355.50	75.00	338.50	20.00	283.50
125	25	32.50	10	13	68	21.50	**295.00**	905.00	395.00	362.00	387.00	93.75	388.75	25.00	320.00
150	25	39.00	10	13	68	21.50	**326.50**	936.50	426.50	393.50	418.50	112.50	439.00	30.00	356.50
175	25	45.50	10	13	68	21.50	**358.00**	968.00	458.00	425.00	450.00	131.25	489.25	35.00	393.00
200	25	52.00	10	13	68	21.50	**389.50**	999.50	489.50	456.50	481.50	150.00	539.50	40.00	429.50
225	25	58.50	10	13	68	21.50	**421.00**	1031.00	521.00	488.00	513.00	168.75	589.75	45.00	466.00

***Milwaukee County only - collect $25.00**

****Victim-Witness Surcharge applicable if the original criminal complaint charged a crime that was later amended to a forfeiture.**

Table 2



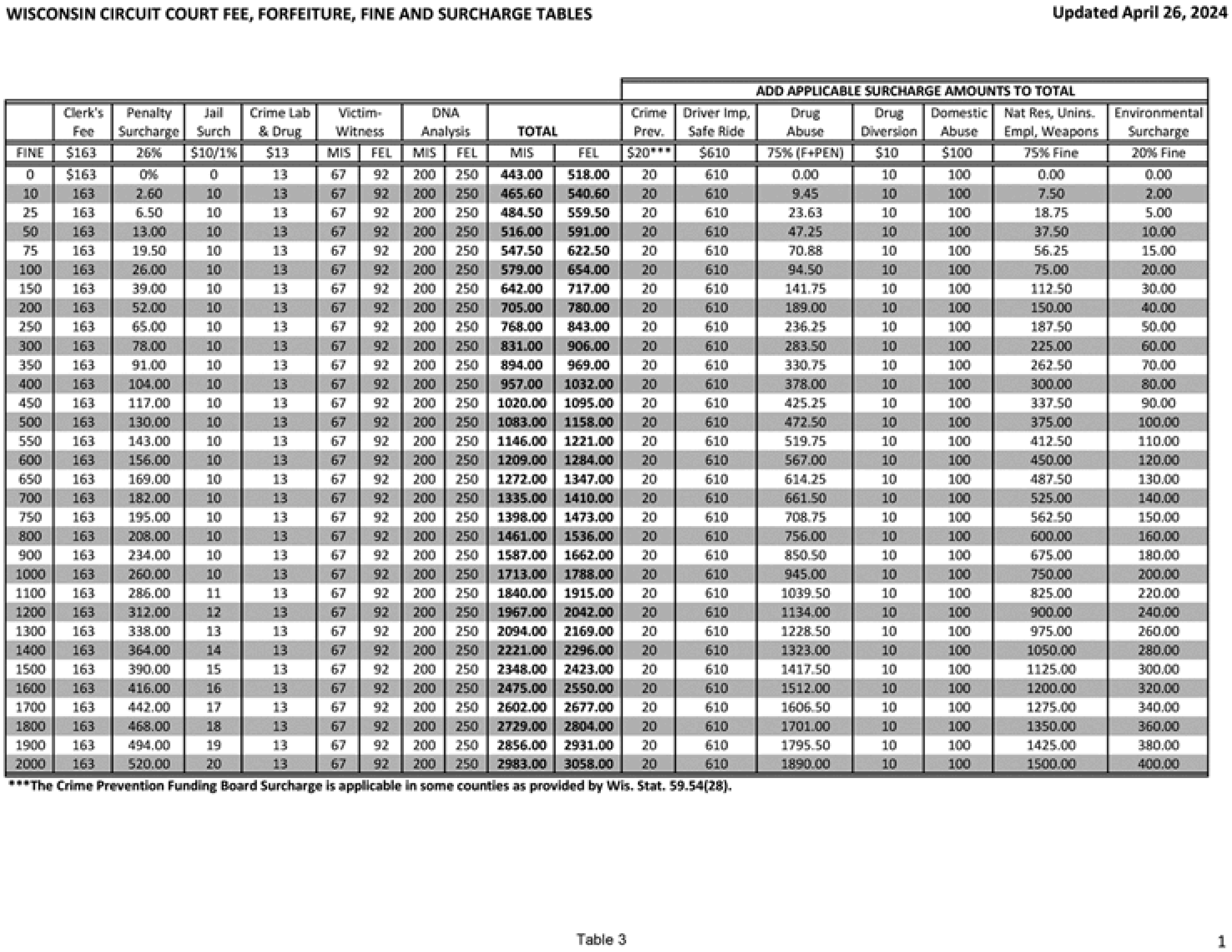
WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

								TOTAL WITH APPLICABLE SURCHARGE AMOUNTS							
	Clerk's Fee	Penalty Surcharge	Jail Surch	Crime Lab & Drug	Court Support	Justice Info*		**Driver Imp, Safe Ride**	**Domestic Abuse**	**Victim-Witness if amended****		**Natural Resources, Unins. Empl, Weapons**		**Environmental Surcharge**	
FORF	$25	26%	$10/1%	$13	$68	$21.50	**TOTAL**	+ $610	+ $100	MIS	FEL	75% Forf.	TOTAL	20% Forf.	TOTAL
250	25	65.00	10	13	68	21.50	**452.50**	1062.50	552.50	519.50	544.50	187.50	640.00	50.00	502.50
275	25	71.50	10	13	68	21.50	**484.00**	1094.00	584.00	551.00	576.00	206.25	690.25	55.00	539.00
300	25	78.00	10	13	68	21.50	**515.50**	1125.50	615.50	582.50	607.50	225.00	740.50	60.00	575.50
350	25	91.00	10	13	68	21.50	**578.50**	1188.50	678.50	645.50	670.50	262.50	841.00	70.00	648.50
400	25	104.00	10	13	68	21.50	**641.50**	1251.50	741.50	708.50	733.50	300.00	941.50	80.00	721.50
450	25	117.00	10	13	68	21.50	**704.50**	6314.50	804.50	771.50	796.50	337.50	1042.00	90.00	794.50
500	25	130.00	10	13	68	21.50	**767.50**	1377.50	867.50	834.50	859.50	375.00	1142.50	100.00	867.50
550	25	143.00	10	13	68	21.50	**830.50**	1440.50	930.50	897.50	922.50	412.50	1243.00	110.00	940.50
600	25	156.00	10	13	68	21.50	**893.50**	1503.50	993.50	960.50	985.50	450.00	1343.50	120.00	1013.50
650	25	169.00	10	13	68	21.50	**956.50**	1566.50	1056.50	1023.50	1048.50	487.50	1444.00	130.00	1086.50
700	25	182.00	10	13	68	21.50	**1019.50**	1629.50	1119.50	1086.50	1111.50	525.00	1544.50	140.00	1159.50
750	25	195.00	10	13	68	21.50	**1082.50**	1692.50	1182.50	1149.50	1174.50	562.50	1645.00	150.00	1232.50
800	25	208.00	10	13	68	21.50	**1145.50**	1755.50	1245.50	1212.50	1237.50	600.00	1745.50	160.00	1305.50
850	25	221.00	10	13	68	21.50	**1208.50**	1818.50	1308.50	1275.50	1300.50	637.50	1846.00	170.00	1378.50
900	25	234.00	10	13	68	21.50	**1271.50**	1881.50	1371.50	1338.50	1363.50	675.00	1946.50	180.00	1451.50
1000	25	260.00	10	13	68	21.50	**1397.50**	2007.50	1497.50	1464.50	1489.50	750.00	2147.50	200.00	1597.50
1100	25	286.00	11	13	68	21.50	**1524.50**	2134.50	1624.50	1591.50	1616.50	825.00	2349.50	220.00	1744.50
1200	25	312.00	12	13	68	21.50	**1651.50**	2261.50	1751.50	1718.50	1743.50	900.00	2551.50	240.00	1891.50
1300	25	338.00	13	13	68	21.50	**1778.50**	2388.50	1878.50	1845.50	1870.50	975.00	2753.50	260.00	2038.50
1400	25	364.00	14	13	68	21.50	**1905.50**	2515.50	2005.50	1972.50	1997.50	1050.00	2955.50	280.00	2185.50
1500	25	390.00	15	13	68	21.50	**2032.50**	2642.50	2132.50	2099.50	2124.50	1125.00	3157.50	300.00	2332.50
1600	25	416.00	16	13	68	21.50	**2159.50**	2769.50	2259.50	2226.50	2251.50	1200.00	3359.50	320.00	2479.50
1700	25	442.00	17	13	68	21.50	**2286.50**	2896.50	2386.50	2353.50	2378.50	1275.00	3561.50	340.00	2626.50
1800	25	468.00	18	13	68	21.50	**2413.50**	3023.50	2513.50	2480.50	2505.50	1350.00	3763.50	360.00	2773.50
1900	25	494.00	19	13	68	21.50	**2540.50**	3150.50	2640.50	2607.50	2632.50	1425.00	3965.50	380.00	2920.50
2000	25	520.00	20	13	68	21.50	**2667.50**	3277.50	2767.50	2734.50	2759.50	1500.00	4167.50	400.00	3067.50

***Milwaukee County only - collect $25.00**

****Victim-Witness Surcharge applicable if the original criminal complaint charged a crime that was later amended to a forfeiture.**

Table 2



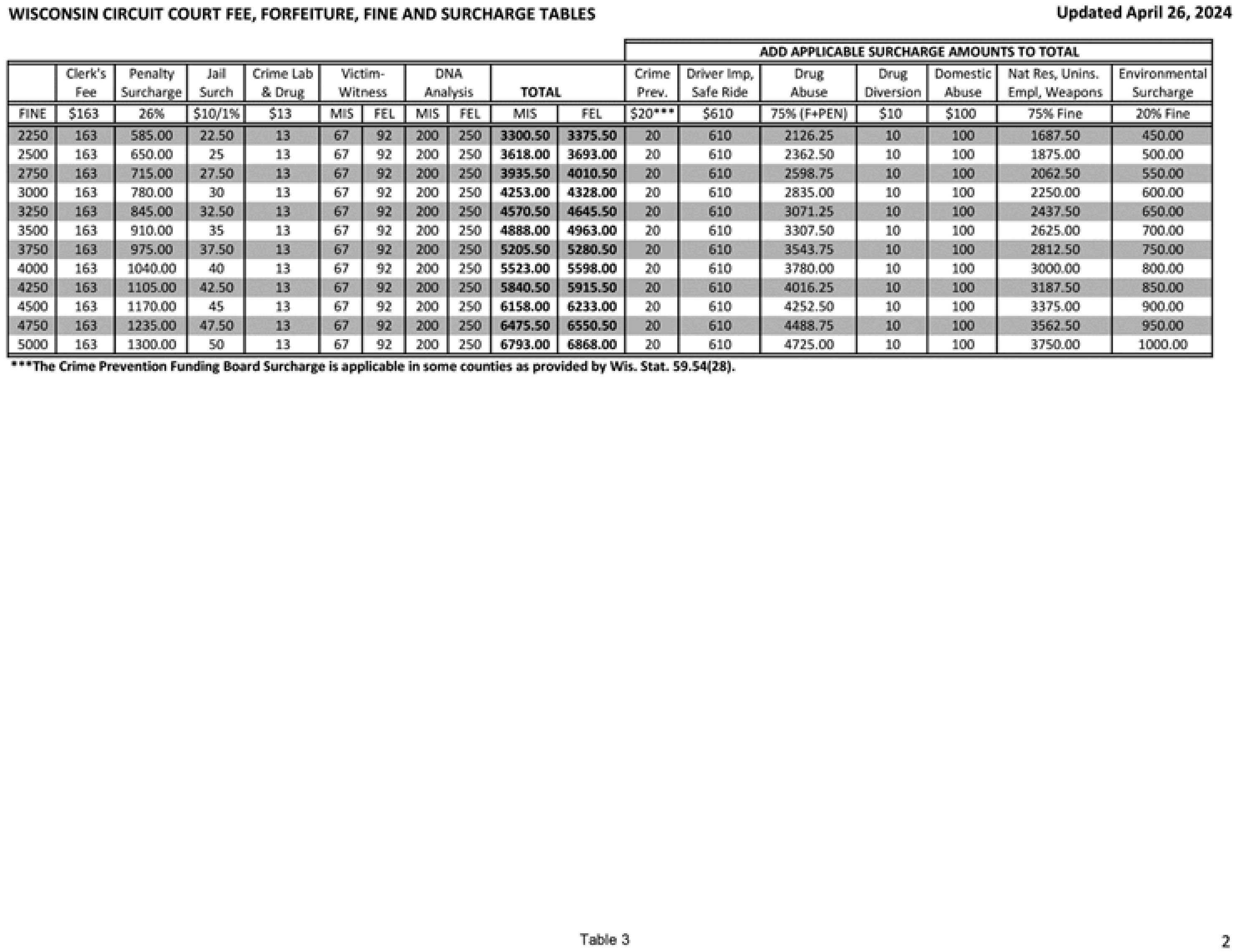
WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES

Updated April 26, 2024

											ADD APPLICABLE SURCHARGE AMOUNTS TO TOTAL						
	Clerk's Fee	Penalty Surcharge	Jail Surch	Crime Lab & Drug	Victim-Witness		DNA Analysis		TOTAL		Crime Prev.	Driver Imp, Safe Ride	Drug Abuse	Drug Diversion	Domestic Abuse	Nat Res, Unins. Empl, Weapons	Environmental Surcharge
FINE	$163	26%	$10/1%	$13	MIS	FEL	MIS	FEL	MIS	FEL	$20***	$610	75% (F+PEN)	$10	$100	75% Fine	20% Fine
0	$163	0%	0	13	67	92	200	250	**443.00**	**518.00**	20	610	0.00	10	100	0.00	0.00
10	163	2.60	10	13	67	92	200	250	**465.60**	**540.60**	20	610	9.45	10	100	7.50	2.00
25	163	6.50	10	13	67	92	200	250	**484.50**	**559.50**	20	610	23.63	10	100	18.75	5.00
50	163	13.00	10	13	67	92	200	250	**516.00**	**591.00**	20	610	47.25	10	100	37.50	10.00
75	163	19.50	10	13	67	92	200	250	**547.50**	**622.50**	20	610	70.88	10	100	56.25	15.00
100	163	26.00	10	13	67	92	200	250	**579.00**	**654.00**	20	610	94.50	10	100	75.00	20.00
150	163	39.00	10	13	67	92	200	250	**642.00**	**717.00**	20	610	141.75	10	100	112.50	30.00
200	163	52.00	10	13	67	92	200	250	**705.00**	**780.00**	20	610	189.00	10	100	150.00	40.00
250	163	65.00	10	13	67	92	200	250	**768.00**	**843.00**	20	610	236.25	10	100	187.50	50.00
300	163	78.00	10	13	67	92	200	250	**831.00**	**906.00**	20	610	283.50	10	100	225.00	60.00
350	163	91.00	10	13	67	92	200	250	**894.00**	**969.00**	20	610	330.75	10	100	262.50	70.00
400	163	104.00	10	13	67	92	200	250	**957.00**	**1032.00**	20	610	378.00	10	100	300.00	80.00
450	163	117.00	10	13	67	92	200	250	**1020.00**	**1095.00**	20	610	425.25	10	100	337.50	90.00
500	163	130.00	10	13	67	92	200	250	**1083.00**	**1158.00**	20	610	472.50	10	100	375.00	100.00
550	163	143.00	10	13	67	92	200	250	**1146.00**	**1221.00**	20	610	519.75	10	100	412.50	110.00
600	163	156.00	10	13	67	92	200	250	**1209.00**	**1284.00**	20	610	567.00	10	100	450.00	120.00
650	163	169.00	10	13	67	92	200	250	**1272.00**	**1347.00**	20	610	614.25	10	100	487.50	130.00
700	163	182.00	10	13	67	92	200	250	**1335.00**	**1410.00**	20	610	661.50	10	100	525.00	140.00
750	163	195.00	10	13	67	92	200	250	**1398.00**	**1473.00**	20	610	708.75	10	100	562.50	150.00
800	163	208.00	10	13	67	92	200	250	**1461.00**	**1536.00**	20	610	756.00	10	100	600.00	160.00
900	163	234.00	10	13	67	92	200	250	**1587.00**	**1662.00**	20	610	850.50	10	100	675.00	180.00
1000	163	260.00	10	13	67	92	200	250	**1713.00**	**1788.00**	20	610	945.00	10	100	750.00	200.00
1100	163	286.00	11	13	67	92	200	250	**1840.00**	**1915.00**	20	610	1039.50	10	100	825.00	220.00
1200	163	312.00	12	13	67	92	200	250	**1967.00**	**2042.00**	20	610	1134.00	10	100	900.00	240.00
1300	163	338.00	13	13	67	92	200	250	**2094.00**	**2169.00**	20	610	1228.50	10	100	975.00	260.00
1400	163	364.00	14	13	67	92	200	250	**2221.00**	**2296.00**	20	610	1323.00	10	100	1050.00	280.00
1500	163	390.00	15	13	67	92	200	250	**2348.00**	**2423.00**	20	610	1417.50	10	100	1125.00	300.00
1600	163	416.00	16	13	67	92	200	250	**2475.00**	**2550.00**	20	610	1512.00	10	100	1200.00	320.00
1700	163	442.00	17	13	67	92	200	250	**2602.00**	**2677.00**	20	610	1606.50	10	100	1275.00	340.00
1800	163	468.00	18	13	67	92	200	250	**2729.00**	**2804.00**	20	610	1701.00	10	100	1350.00	360.00
1900	163	494.00	19	13	67	92	200	250	**2856.00**	**2931.00**	20	610	1795.50	10	100	1425.00	380.00
2000	163	520.00	20	13	67	92	200	250	**2983.00**	**3058.00**	20	610	1890.00	10	100	1500.00	400.00

*****The Crime Prevention Funding Board Surcharge is applicable in some counties as provided by Wis. Stat. 59.54(28).**

Table 3



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES

Updated April 26, 2024

	Clerk's Fee	Penalty Surcharge	Jail Surch	Crime Lab & Drug	Victim-Witness		DNA Analysis		**TOTAL**		**ADD APPLICABLE SURCHARGE AMOUNTS TO TOTAL** Crime Prev.	Driver Imp, Safe Ride	Drug Abuse	Drug Diversion	Domestic Abuse	Nat Res, Unins. Empl, Weapons	Environmental Surcharge
FINE	$163	26%	$10/1%	$13	MIS	FEL	MIS	FEL	MIS	FEL	$20***	$610	75% (F+PEN)	$10	$100	75% Fine	20% Fine
2250	163	585.00	22.50	13	67	92	200	250	**3300.50**	**3375.50**	20	610	2126.25	10	100	1687.50	450.00
2500	163	650.00	25	13	67	92	200	250	**3618.00**	**3693.00**	20	610	2362.50	10	100	1875.00	500.00
2750	163	715.00	27.50	13	67	92	200	250	**3935.50**	**4010.50**	20	610	2598.75	10	100	2062.50	550.00
3000	163	780.00	30	13	67	92	200	250	**4253.00**	**4328.00**	20	610	2835.00	10	100	2250.00	600.00
3250	163	845.00	32.50	13	67	92	200	250	**4570.50**	**4645.50**	20	610	3071.25	10	100	2437.50	650.00
3500	163	910.00	35	13	67	92	200	250	**4888.00**	**4963.00**	20	610	3307.50	10	100	2625.00	700.00
3750	163	975.00	37.50	13	67	92	200	250	**5205.50**	**5280.50**	20	610	3543.75	10	100	2812.50	750.00
4000	163	1040.00	40	13	67	92	200	250	**5523.00**	**5598.00**	20	610	3780.00	10	100	3000.00	800.00
4250	163	1105.00	42.50	13	67	92	200	250	**5840.50**	**5915.50**	20	610	4016.25	10	100	3187.50	850.00
4500	163	1170.00	45	13	67	92	200	250	**6158.00**	**6233.00**	20	610	4252.50	10	100	3375.00	900.00
4750	163	1235.00	47.50	13	67	92	200	250	**6475.50**	**6550.50**	20	610	4488.75	10	100	3562.50	950.00
5000	163	1300.00	50	13	67	92	200	250	**6793.00**	**6868.00**	20	610	4725.00	10	100	3750.00	1000.00

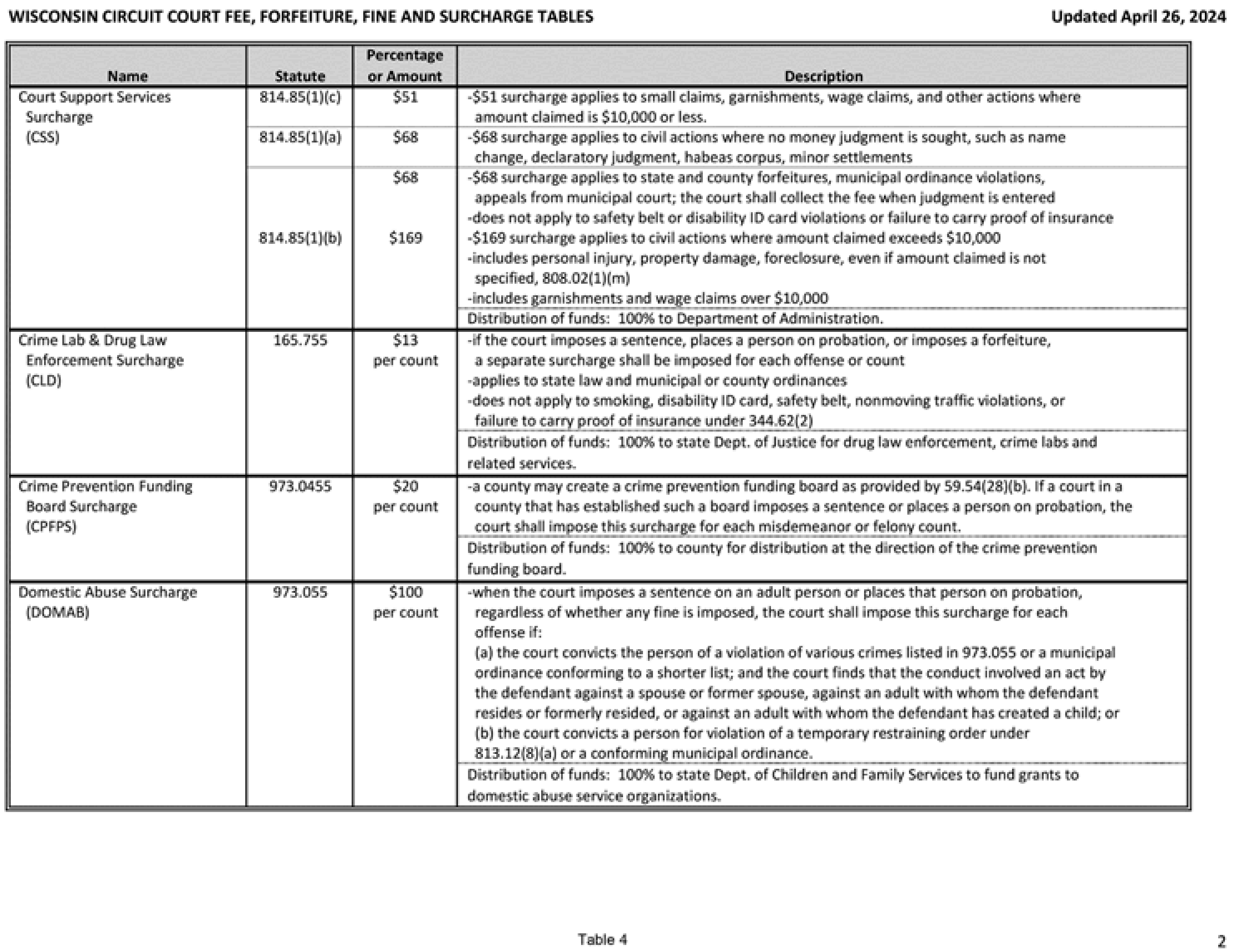
*****The Crime Prevention Funding Board Surcharge is applicable in some counties as provided by Wis. Stat. 59.54(28).**

Table 3

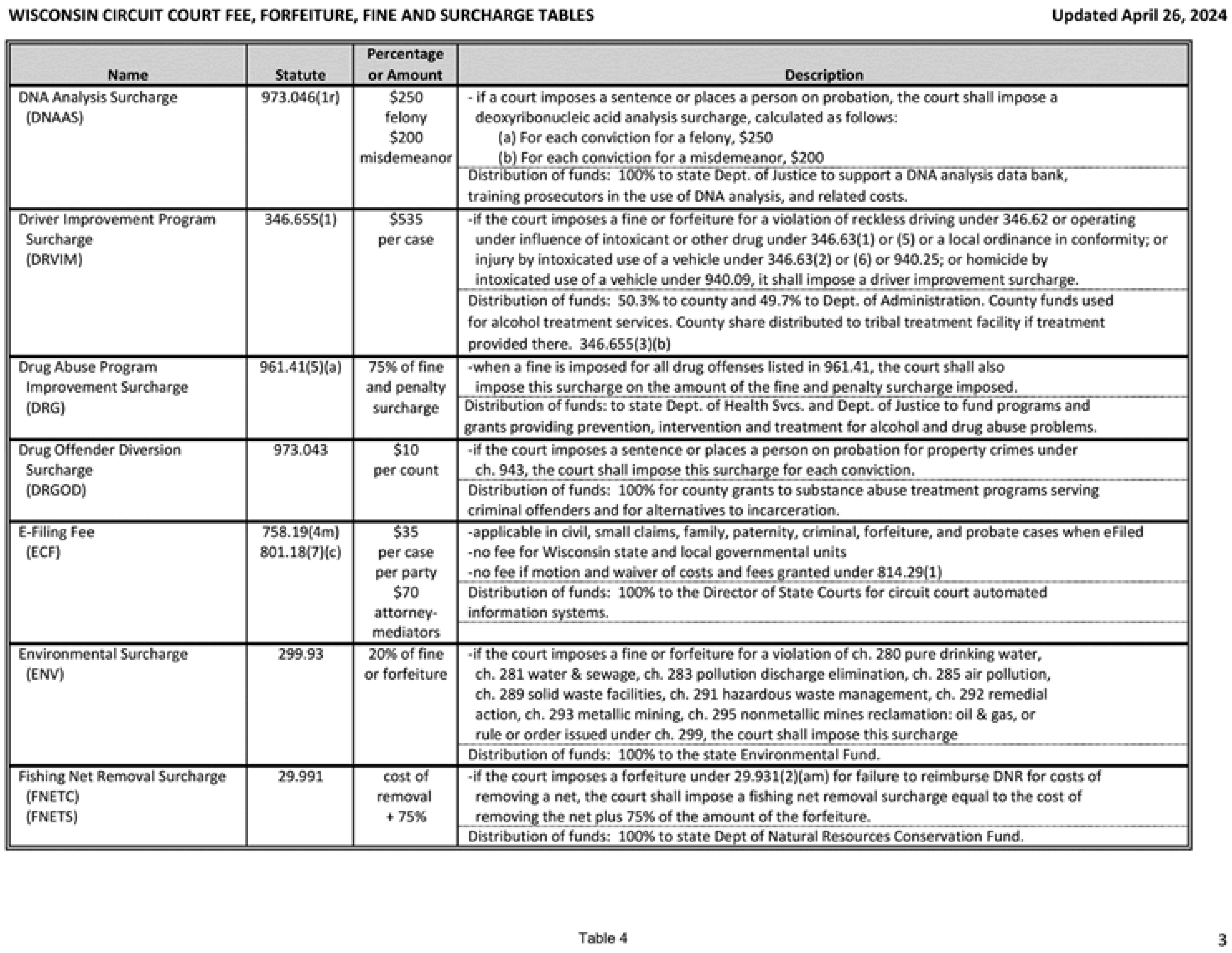
WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

Name	Statute	Percentage or Amount	Description
Bisphenol A Enforcement Surcharge (BPAS)	100.335(7)	50% of fine or forfeiture	-if a court imposes a fine or forfeiture under 100.335, sale or manufacture of children's containers containing BPA, the court shall impose a surcharge equal to 50% of the fine or forfeiture. Distribution of funds: 100% to Dept of Agriculture Trade and Consumer Protection to fund enforcement of BPA prohibitions.
Blood Withdrawal Cost (BTCC, BTCM, BTST, BTDNR, BTUW)	973.06(1)(j), 814.63(3m)	amt. varies based on actual cost	-if a defendant is convicted of operating a vehicle while intoxicated under 23.43(4c), 233.335(12)(a) or (b), 30.681, 114.09, 346.63, 350.101, 940.09(1) or 940.25, any cost paid by law enforcement for withdrawal of defendant's blood shall be placed on defendant. Distribution of funds: 100% to the law enforcement agency paying for the withdrawal.
Child Pornography Surcharge (CHPRN)	973.042	$500 per image or copy	-if a court imposes a sentence or places a person on probation for a crime under 948.05 or 948.12, the court shall impose a child pornography surcharge for each image or each copy of an image associated with the crime. Distribution of funds: 100% to the Dept of Justice for investigations of sexual assaults against children and grants for sexual assault victim services.
Clerk Fee, Civil forfeiture (CCFP)	814.63(1)(b) 814.63(1)(c)	$25 per count	-applies to most forfeitures; the clerk shall collect a fee to be paid when judgment is entered -does not apply to smoking violations under 101.123(2) or (2m), safety belt violations under 347.48(2m), disability ID card violations under 343.51(1m)(b), or failure to carry proof of insurance under 344.62(2) Distribution of funds: $5 to Consolidated Court Automation Program (CCAP); $7.50 to county; $12.50 to state general fund.
Clerk Fee, Criminal (CCFP)	814.60(1)	$163 per count	-applies to all criminal actions; the clerk shall collect the fee when judgment is entered Distribution of funds: 6.13% county, 93.87% state.
Commercial Fish Protection Surcharge (CFISH)	29.984	amt. varies based on value of fish	-if a court imposes a forfeiture under 29.971 for unlawful acts involving Great Lakes fish in violation of 29.503, 29.514, or 29.519, the court may impose a commercial fish protection surcharge equal to the value of any commercial fish taken. For a fine imposed, the surcharge shall be an amount equal to 3 times the value of the fish. Distribution of funds: 100% to Dept of Nat Resources for research on Great Lakes fish.
Consumer Protection Surcharge (CONPR)	100.261	25% of fine or forfeiture	-applies to violations of ch. 98 (weights and measures), ch. 100 (marketing and trade practices), and related ordinances and administrative rules -if the court imposes a fine or forfeiture, the court shall also impose this surcharge Distribution of funds: 100% to state Dept. of Justice to fund consumer protection information and education up to $185,000 under 20.115(1)(jb); balance to general fund.

Table 4



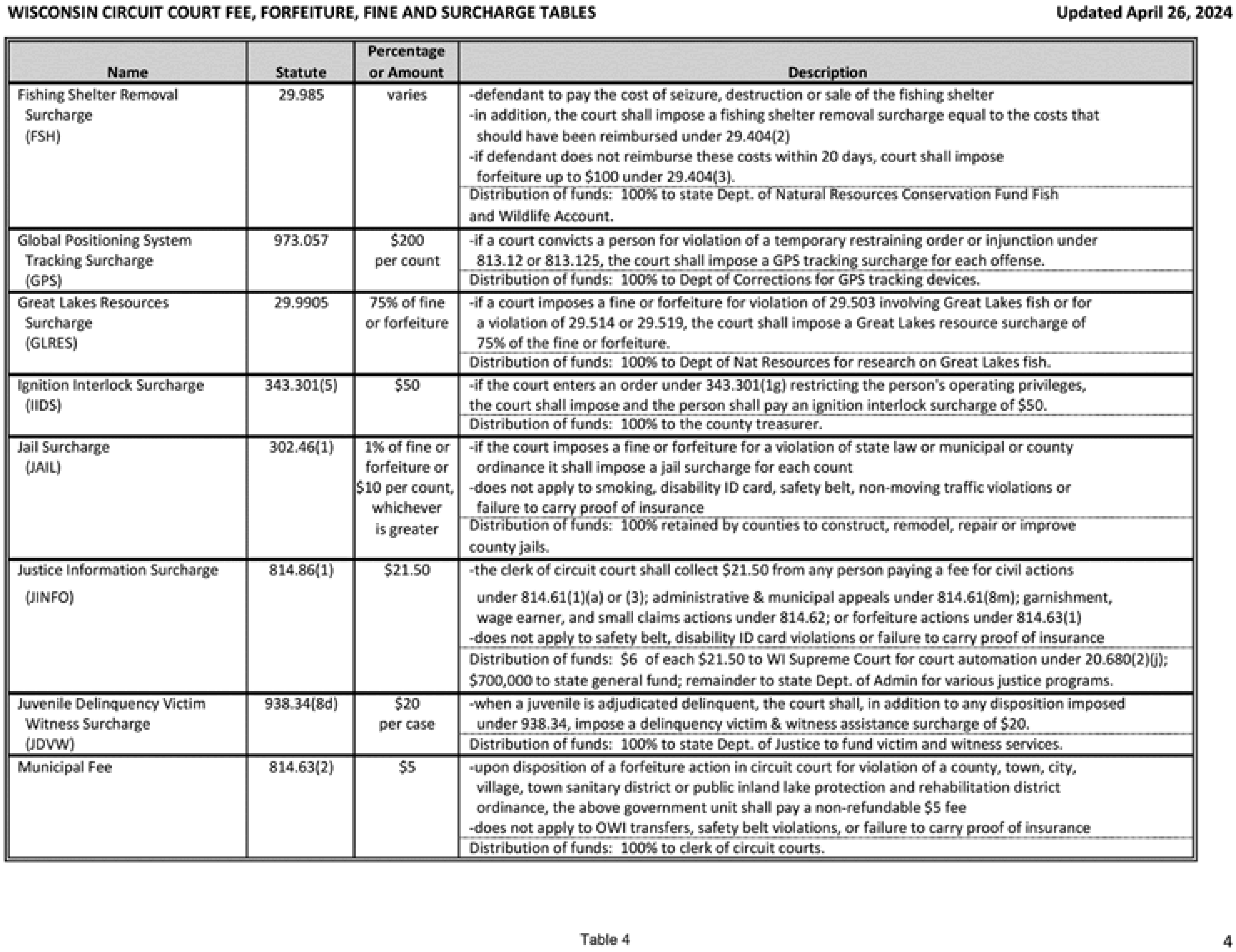
Name	Statute	Percentage or Amount	Description
Court Support Services Surcharge (CSS)	814.85(1)(c)	$51	-$51 surcharge applies to small claims, garnishments, wage claims, and other actions where amount claimed is $10,000 or less.
	814.85(1)(a)	$68	-$68 surcharge applies to civil actions where no money judgment is sought, such as name change, declaratory judgment, habeas corpus, minor settlements
		$68	-$68 surcharge applies to state and county forfeitures, municipal ordinance violations, appeals from municipal court; the court shall collect the fee when judgment is entered -does not apply to safety belt or disability ID card violations or failure to carry proof of insurance
	814.85(1)(b)	$169	-$169 surcharge applies to civil actions where amount claimed exceeds $10,000 -includes personal injury, property damage, foreclosure, even if amount claimed is not specified, 808.02(1)(m) -includes garnishments and wage claims over $10,000
			Distribution of funds: 100% to Department of Administration.
Crime Lab & Drug Law Enforcement Surcharge (CLD)	165.755	$13 per count	-if the court imposes a sentence, places a person on probation, or imposes a forfeiture, a separate surcharge shall be imposed for each offense or count -applies to state law and municipal or county ordinances -does not apply to smoking, disability ID card, safety belt, nonmoving traffic violations, or failure to carry proof of insurance under 344.62(2)
			Distribution of funds: 100% to state Dept. of Justice for drug law enforcement, crime labs and related services.
Crime Prevention Funding Board Surcharge (CPFPS)	973.0455	$20 per count	-a county may create a crime prevention funding board as provided by 59.54(28)(b). If a court in a county that has established such a board imposes a sentence or places a person on probation, the court shall impose this surcharge for each misdemeanor or felony count.
			Distribution of funds: 100% to county for distribution at the direction of the crime prevention funding board.
Domestic Abuse Surcharge (DOMAB)	973.055	$100 per count	-when the court imposes a sentence on an adult person or places that person on probation, regardless of whether any fine is imposed, the court shall impose this surcharge for each offense if: (a) the court convicts the person of a violation of various crimes listed in 973.055 or a municipal ordinance conforming to a shorter list; and the court finds that the conduct involved an act by the defendant against a spouse or former spouse, against an adult with whom the defendant resides or formerly resided, or against an adult with whom the defendant has created a child; or (b) the court convicts a person for violation of a temporary restraining order under 813.12(8)(a) or a conforming municipal ordinance.
			Distribution of funds: 100% to state Dept. of Children and Family Services to fund grants to domestic abuse service organizations.



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

Name	Statute	Percentage or Amount	Description
DNA Analysis Surcharge (DNAAS)	973.046(1r)	$250 felony $200 misdemeanor	- if a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows: (a) For each conviction for a felony, $250 (b) For each conviction for a misdemeanor, $200 Distribution of funds: 100% to state Dept. of Justice to support a DNA analysis data bank, training prosecutors in the use of DNA analysis, and related costs.
Driver Improvement Program Surcharge (DRVIM)	346.655(1)	$535 per case	-if the court imposes a fine or forfeiture for a violation of reckless driving under 346.62 or operating under influence of intoxicant or other drug under 346.63(1) or (5) or a local ordinance in conformity; or injury by intoxicated use of a vehicle under 346.63(2) or (6) or 940.25; or homicide by intoxicated use of a vehicle under 940.09, it shall impose a driver improvement surcharge. Distribution of funds: 50.3% to county and 49.7% to Dept. of Administration. County funds used for alcohol treatment services. County share distributed to tribal treatment facility if treatment provided there. 346.655(3)(b)
Drug Abuse Program Improvement Surcharge (DRG)	961.41(5)(a)	75% of fine and penalty surcharge	-when a fine is imposed for all drug offenses listed in 961.41, the court shall also impose this surcharge on the amount of the fine and penalty surcharge imposed. Distribution of funds: to state Dept. of Health Svcs. and Dept. of Justice to fund programs and grants providing prevention, intervention and treatment for alcohol and drug abuse problems.
Drug Offender Diversion Surcharge (DRGOD)	973.043	$10 per count	-if the court imposes a sentence or places a person on probation for property crimes under ch. 943, the court shall impose this surcharge for each conviction. Distribution of funds: 100% for county grants to substance abuse treatment programs serving criminal offenders and for alternatives to incarceration.
E-Filing Fee (ECF)	758.19(4m) 801.18(7)(c)	$35 per case per party $70 attorney-mediators	-applicable in civil, small claims, family, paternity, criminal, forfeiture, and probate cases when eFiled -no fee for Wisconsin state and local governmental units -no fee if motion and waiver of costs and fees granted under 814.29(1) Distribution of funds: 100% to the Director of State Courts for circuit court automated information systems.
Environmental Surcharge (ENV)	299.93	20% of fine or forfeiture	-if the court imposes a fine or forfeiture for a violation of ch. 280 pure drinking water, ch. 281 water & sewage, ch. 283 pollution discharge elimination, ch. 285 air pollution, ch. 289 solid waste facilities, ch. 291 hazardous waste management, ch. 292 remedial action, ch. 293 metallic mining, ch. 295 nonmetallic mines reclamation: oil & gas, or rule or order issued under ch. 299, the court shall impose this surcharge Distribution of funds: 100% to the state Environmental Fund.
Fishing Net Removal Surcharge (FNETC) (FNETS)	29.991	cost of removal + 75%	-if the court imposes a forfeiture under 29.931(2)(am) for failure to reimburse DNR for costs of removing a net, the court shall impose a fishing net removal surcharge equal to the cost of removing the net plus 75% of the amount of the forfeiture. Distribution of funds: 100% to state Dept of Natural Resources Conservation Fund.

Table 4



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

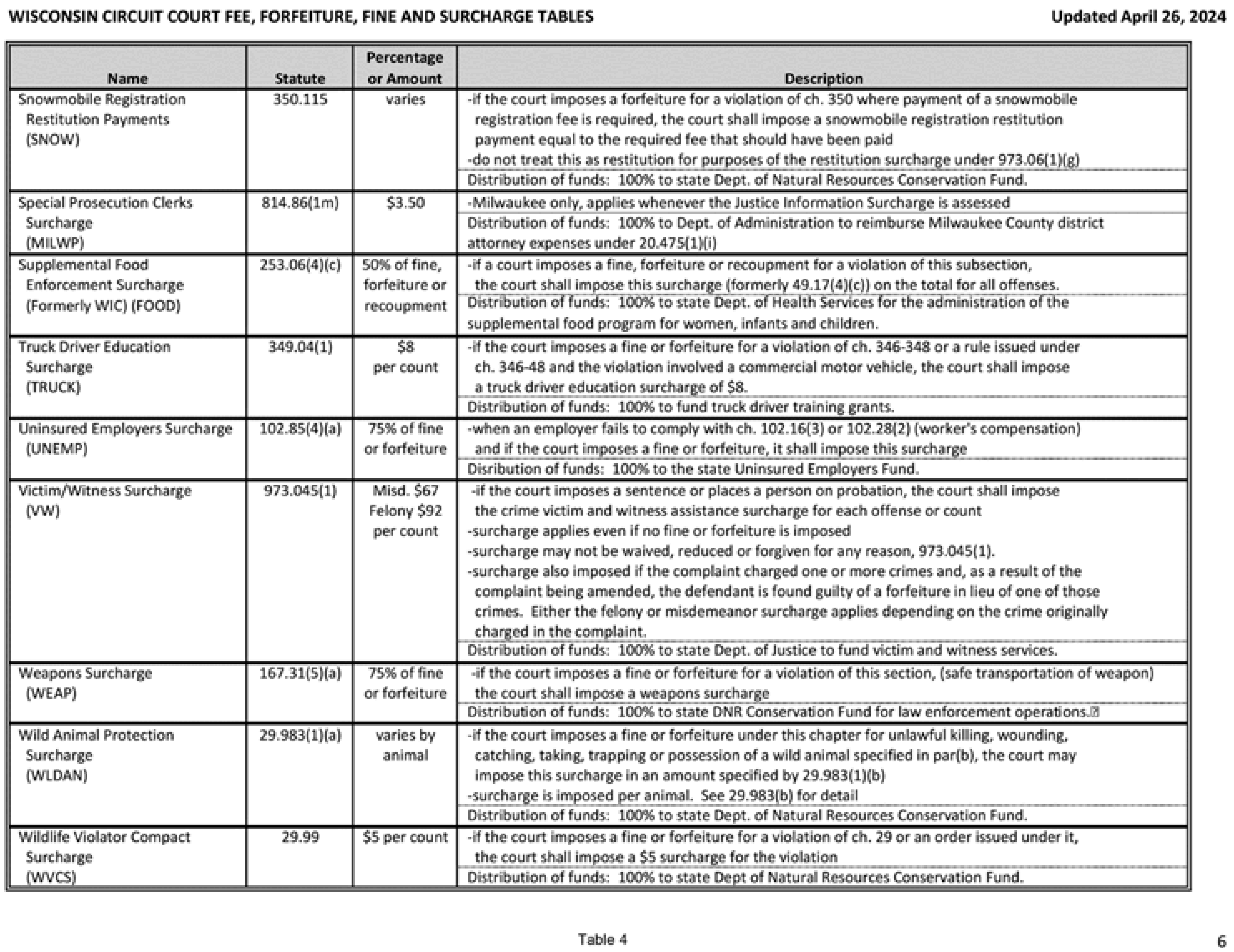
Name	Statute	Percentage or Amount	Description
Fishing Shelter Removal Surcharge (FSH)	29.985	varies	-defendant to pay the cost of seizure, destruction or sale of the fishing shelter -in addition, the court shall impose a fishing shelter removal surcharge equal to the costs that should have been reimbursed under 29.404(2) -if defendant does not reimburse these costs within 20 days, court shall impose forfeiture up to $100 under 29.404(3). Distribution of funds: 100% to state Dept. of Natural Resources Conservation Fund Fish and Wildlife Account.
Global Positioning System Tracking Surcharge (GPS)	973.057	$200 per count	-if a court convicts a person for violation of a temporary restraining order or injunction under 813.12 or 813.125, the court shall impose a GPS tracking surcharge for each offense. Distribution of funds: 100% to Dept of Corrections for GPS tracking devices.
Great Lakes Resources Surcharge (GLRES)	29.9905	75% of fine or forfeiture	-if a court imposes a fine or forfeiture for violation of 29.503 involving Great Lakes fish or for a violation of 29.514 or 29.519, the court shall impose a Great Lakes resource surcharge of 75% of the fine or forfeiture. Distribution of funds: 100% to Dept of Nat Resources for research on Great Lakes fish.
Ignition Interlock Surcharge (IIDS)	343.301(5)	$50	-if the court enters an order under 343.301(1g) restricting the person's operating privileges, the court shall impose and the person shall pay an ignition interlock surcharge of $50. Distribution of funds: 100% to the county treasurer.
Jail Surcharge (JAIL)	302.46(1)	1% of fine or forfeiture or $10 per count, whichever is greater	-if the court imposes a fine or forfeiture for a violation of state law or municipal or county ordinance it shall impose a jail surcharge for each count -does not apply to smoking, disability ID card, safety belt, non-moving traffic violations or failure to carry proof of insurance Distribution of funds: 100% retained by counties to construct, remodel, repair or improve county jails.
Justice Information Surcharge (JINFO)	814.86(1)	$21.50	-the clerk of circuit court shall collect $21.50 from any person paying a fee for civil actions under 814.61(1)(a) or (3); administrative & municipal appeals under 814.61(8m); garnishment, wage earner, and small claims actions under 814.62; or forfeiture actions under 814.63(1) -does not apply to safety belt, disability ID card violations or failure to carry proof of insurance Distribution of funds: $6 of each $21.50 to WI Supreme Court for court automation under 20.680(2)(j); $700,000 to state general fund; remainder to state Dept. of Admin for various justice programs.
Juvenile Delinquency Victim Witness Surcharge (JDVW)	938.34(8d)	$20 per case	-when a juvenile is adjudicated delinquent, the court shall, in addition to any disposition imposed under 938.34, impose a delinquency victim & witness assistance surcharge of $20. Distribution of funds: 100% to state Dept. of Justice to fund victim and witness services.
Municipal Fee	814.63(2)	$5	-upon disposition of a forfeiture action in circuit court for violation of a county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district ordinance, the above government unit shall pay a non-refundable $5 fee -does not apply to OWI transfers, safety belt violations, or failure to carry proof of insurance Distribution of funds: 100% to clerk of circuit courts.

Table 4

4

Name	Statute	Percentage or Amount	Description
Natural Resources Surcharge (NATR)	29.987 169.46(1)	75% of fine or forfeiture	-if the court imposes a fine or forfeiture for violation of ch. 29 (wild animals and plants) or or ch. 169 (captive wildlife), or related order the court shall impose this surcharge Distribution of funds: 100% to state Dept. of Natural Resources Conservation Fund.
Natural Resources Restitution Surcharge (NREST)	29.989 169.46(2)	varies	-if the court imposes a natural resources restitution surcharge for violation of ch. 29 or Ch. 169, or a related order, the court shall impose this surcharge in the amount of the statutory fee of the approval which should have been obtained -do not treat this as restitution for purposes of the restitution surcharge under 973.06(1)(g) Distribution of funds: 100% to state Dept. of Natural Resources Conservation Fund.
Penalty Surcharge (PEN)	757.05	26% of fine or forfeiture	-if the court imposes a fine or forfeiture for a violation of state law or municipal or county ordinances, it shall impose a penalty surcharge -does not apply to smoking, disability ID card, non-moving traffic, safety belt violations or failure to carry proof of insurance Distribution of funds: 100% to state Dept. of Justice for law enforcement training and related services.
Railroad Crossing Improvement Surcharge (RRCI)	346.495 346.65(4r) 346.177	50% of forfeiture	-if the court imposes a forfeiture under 346.49(1g), (2m)(a), (am), or (b), for a violation of 346.44, 346.45, or 346.46(3) the court shall impose this surcharge Distribution of funds: 100% to state Dept. of Transportation to fund railroad crossing protection installation and maintenance.
Restitution Surcharge (RST10)	973.06(1)(g)	10% of any restitution ordered	-if the court orders restitution under 973.20(1r), the court shall impose an amount equal to 10% of the restitution ordered Distribution of funds: 100% to county treasurer.
Restitution Administrative Surcharge (REST5)	973.20(11)(a)	5% of total fines, surcharges, costs, etc.	-if defendant is not placed on probation or sentenced to prison, the court may order that restitution be paid to the clerk of circuit court for transfer to the appropriate person -if defendant is placed on probation, restitution paid to DOC for transfer to the appropriate person -the court shall impose a surcharge equal to 5% of the total amount of restitution, costs, attorney fees, fines and surcharges, including the 10% restitution surcharge Distribution of funds: 100% to Dept. of Corrections or clerk for administrative expenses.
Safe Ride Program Surcharge (SRPS)	346.657(1)	$75 per case	-if the court imposes a fine or forfeiture for a violation of reckless driving under 346.62 or operating under influence of intoxicant or other drug under 346.63(1) or (5) or a local ordinance in conformity; or injury by intoxicated use of a vehicle under 346.63(2) or (6) or 940.25; or homicide by intoxicated use of a vehicle under 940.09, it shall impose a safe ride program surcharge. Distribution of funds: 100% to Dept. of Administration for the Safe Ride Program under 85.55.
Sheriff's Surcharge (WF)	973.06(1)(a) & 814.70	varies	-the necessary disbursements and surcharges of officers allowed by law and incurred in connection with the arrest, preliminary examination and trial of the defendant -use amount on the bench warrant or order to produce; if none don't assess Distribution of funds: 100% to county sheriff's dept.

Table 4



WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES **Updated April 26, 2024**

Name	Statute	Percentage or Amount	Description
Snowmobile Registration Restitution Payments (SNOW)	350.115	varies	-if the court imposes a forfeiture for a violation of ch. 350 where payment of a snowmobile registration fee is required, the court shall impose a snowmobile registration restitution payment equal to the required fee that should have been paid -do not treat this as restitution for purposes of the restitution surcharge under 973.06(1)(g) Distribution of funds: 100% to state Dept. of Natural Resources Conservation Fund.
Special Prosecution Clerks Surcharge (MILWP)	814.86(1m)	$3.50	-Milwaukee only, applies whenever the Justice Information Surcharge is assessed Distribution of funds: 100% to Dept. of Administration to reimburse Milwaukee County district attorney expenses under 20.475(1)(i)
Supplemental Food Enforcement Surcharge (Formerly WIC) (FOOD)	253.06(4)(c)	50% of fine, forfeiture or recoupment	-if a court imposes a fine, forfeiture or recoupment for a violation of this subsection, the court shall impose this surcharge (formerly 49.17(4)(c)) on the total for all offenses. Distribution of funds: 100% to state Dept. of Health Services for the administration of the supplemental food program for women, infants and children.
Truck Driver Education Surcharge (TRUCK)	349.04(1)	$8 per count	-if the court imposes a fine or forfeiture for a violation of ch. 346-348 or a rule issued under ch. 346-48 and the violation involved a commercial motor vehicle, the court shall impose a truck driver education surcharge of $8. Distribution of funds: 100% to fund truck driver training grants.
Uninsured Employers Surcharge (UNEMP)	102.85(4)(a)	75% of fine or forfeiture	-when an employer fails to comply with ch. 102.16(3) or 102.28(2) (worker's compensation) and if the court imposes a fine or forfeiture, it shall impose this surcharge Disribution of funds: 100% to the state Uninsured Employers Fund.
Victim/Witness Surcharge (VW)	973.045(1)	Misd. $67 Felony $92 per count	-if the court imposes a sentence or places a person on probation, the court shall impose the crime victim and witness assistance surcharge for each offense or count -surcharge applies even if no fine or forfeiture is imposed -surcharge may not be waived, reduced or forgiven for any reason, 973.045(1). -surcharge also imposed if the complaint charged one or more crimes and, as a result of the complaint being amended, the defendant is found guilty of a forfeiture in lieu of one of those crimes. Either the felony or misdemeanor surcharge applies depending on the crime originally charged in the complaint. Distribution of funds: 100% to state Dept. of Justice to fund victim and witness services.
Weapons Surcharge (WEAP)	167.31(5)(a)	75% of fine or forfeiture	-if the court imposes a fine or forfeiture for a violation of this section, (safe transportation of weapon) the court shall impose a weapons surcharge Distribution of funds: 100% to state DNR Conservation Fund for law enforcement operations.
Wild Animal Protection Surcharge (WLDAN)	29.983(1)(a)	varies by animal	-if the court imposes a fine or forfeiture under this chapter for unlawful killing, wounding, catching, taking, trapping or possession of a wild animal specified in par(b), the court may impose this surcharge in an amount specified by 29.983(1)(b) -surcharge is imposed per animal. See 29.983(b) for detail Distribution of funds: 100% to state Dept. of Natural Resources Conservation Fund.
Wildlife Violator Compact Surcharge (WVCS)	29.99	$5 per count	-if the court imposes a fine or forfeiture for a violation of ch. 29 or an order issued under it, the court shall impose a $5 surcharge for the violation Distribution of funds: 100% to state Dept of Natural Resources Conservation Fund.

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[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the Wisconsin Jury Instructions—Criminal are current through the July 2024 release; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-78 (July 30, 2024).

[1] Deadlines should be calculated as early as possible in a case. Form 2.4A, *infra*, duplicates this checklist but adds a fifth column in which the deadlines for a specific case can be noted. The defense attorney should always check local court rules, which may establish deadlines not noted here.

[2] Includes first-degree intentional homicide, Wis. Stat. § 940.01; first-degree reckless homicide, Wis. Stat. § 940.02; felony murder, Wis. Stat. § 940.03; second-degree intentional homicide, Wis. Stat. § 940.05; first-degree sexual assault, Wis. Stat. § 940.225(1); first-degree sexual assault of a child, Wis. Stat. § 948.02(1); and repeated sexual acts with same child, Wis. Stat. § 948.025(1)(a)–(d).

[3] Second-degree reckless homicide, Wis. Stat. § 940.06.

[4] Second-degree sexual assault or third-degree sexual assault, Wis. Stat. § 940.225(2) or (3).

[5] Specific statutes subject to this expanded limitation period are set forth in Wis. Stat. § 939.74(2)(c).

[6] *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that probable-cause determination should normally be made within 48 hours after arrest); *see also Mitchell v. Doherty*, 37 F.4th 1277, 1289 (7th Cir. 2022) (holding that the Fourth Amendment does not require a bail hearing within 48 hours, and hearings may be help up to 68 hours after an individual was arrested on a Friday); *State v. Koch*, 175 Wis. 2d 684, 699–700, 499 N.W.2d 152 (1993) (holding that suppression not appropriate unless delay of initial appearance resulted in police obtaining evidence); *State v. Golden*, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994) (holding that violation of presumptive 48-hour time limit is not a jurisdictional defect and is not ordinarily a reason for dismissal).

[7] *See State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 341, 227 N.W.2d 450 (1975).

[8] At the first appearance in all cases, counsel should orally preserve the right to raise jurisdictional objections, which include challenges to the sufficiency of the complaint.

[9] This time limit is not specified in the statute; it is the author's opinion, however, that the motion should be filed before arraignment, by analogy to other motions related to the preliminary examination. If new grounds for transfer to juvenile court arise because of a favorable trial result or settlement, a motion citing the new grounds should be considered timely.

[10] *See Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972).

[11] Includes testimony before grand jury or John Doe proceeding.

[12] Defense attorney should file a motion within a reasonable time after receiving the state's discovery demand.

[13] One 15-day extension is allowed.

[14] Appointment of physicians or psychologists is discretionary under Wis. Stat. § 971.16. An indigent defendant, however, is constitutionally entitled to be evaluated by a mental health expert, at state expense, when mental responsibility is an issue. *State v. Burdick*, 166 Wis. 2d 785, 789, 480 N.W.2d 528 (Ct. App. 1992).

[15] The prosecution must also have been afforded an opportunity to examine and observe the defendant, if such an opportunity has been seasonably demanded.

[16] The court may grant a continuance under Wis. Stat. § 971.10(3).

[17] *See infra* ch. 9 (Quick Reference Guide to Postconviction Relief Under Section 809.30); *see also infra* Form 9.47A.

[18] *Rosado v. State*, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). The 90-day time limit is considered regulatory, not jurisdictional, *Klimas v. State*, 75 Wis. 2d 244, 246, 249 N.W.2d 285 (1977), and motions for modification of sentence may therefore be brought whenever a new factor is discovered, *see infra* §§ 9.14, .43.

[19] Applicable to offenses occurring on or after December 31, 1999.

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the supreme court rules (SCR) are current through orders issued through Aug. 16, 2024.

[1] The sentencing date is usually the same as the date of entry of judgment. This date is crucial because it begins the running of the time limit within which the client's right to appeal is preserved.

[2] This date is important for sentence-credit computations under Wis. Stat. § 973.155.

[3] This date is important for sentence-credit computations under Wis. Stat. § 973.155.

[4] Includes first-degree intentional homicide, Wis. Stat. § 940.01; first-degree reckless homicide, Wis. Stat. § 940.02; felony murder, Wis. Stat. § 940.03; second-degree intentional homicide, Wis. Stat. § 940.05; first-degree sexual assault of a child, Wis. Stat. § 948.02(1); and repeated sexual acts with same child, Wis. Stat. § 948.025(1)(a)–(d).

[5] Second-degree reckless homicide, Wis. Stat. § 940.06.

[6] Specific statutes subject to this expanded limitation period are set forth in Wis. Stat. § 939.74(2)(c).

[7] *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that probable-cause determination should normally be made within 48 hours after arrest); *see also Mitchell v. Doherty*, 37 F.4th 1277 (7th Cir. 2022) (holding that the Fourth Amendment does not require a bail hearing within 48 hours after an arrest, and hearings may be help up to 68 hours after an arrest that occurs on a Friday); *State v. Koch*, 175 Wis. 2d 684, 699–700, 499 N.W.2d 152 (1993) (holding that suppression not appropriate unless delay of initial appearance resulted in police obtaining evidence); *State v. Golden*, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994) (holding that violation of presumptive 48-hour time limit is not a jurisdictional defect and is not ordinarily a reason for dismissal).

[8] *See State ex rel. Warrender v. Kenosha Cnty. Ct.*, 67 Wis. 2d 333, 227 N.W.2d 450 (1975).

[9] At the first appearance in all cases, counsel should orally reserve the right to raise jurisdictional objections, which include challenges to the sufficiency of the complaint.

[10] This time limit is not specified in the statute; it is the author's opinion, however, that the motion should be filed before arraignment, by analogy to other motions related to the preliminary examination. If new grounds for transfer to juvenile court arise because of a favorable trial result or settlement, a motion citing the new grounds should be considered timely.

[11] *See Bies v. State*, 53 Wis. 2d 322, 193 N.W.2d 46 (1972).

[12] Includes testimony before grand jury or John Doe proceeding.

[13] The defense should file a motion within a reasonable time after receiving the state's discovery demand.

[14] One 15-day extension is allowed.

[15] Effective July 1, 2024, there is a new procedure for appealing orders under Wis. Stat. § 971.14. Those procedures are found in Wis. Stat. § 809.109, and a summary and checklist of the procedures are available on the SPD's website, https://www.wispd.gov/competency.

[16] Appointment of physicians or psychologists is discretionary under Wis. Stat. § 971.16. An indigent defendant, however, is constitutionally entitled to be evaluated by a mental-health expert, at state expense, when mental responsibility is an issue. *State v. Burdick*, 166 Wis. 2d 785, 789, 480 N.W.2d 528 (Ct. App. 1992).

[17] The prosecution must also have been afforded an opportunity to examine and observe the defendant, if such an opportunity has been reasonably demanded.

[18] The court may grant a continuance under Wis. Stat. § 971.10(3).

[19] *See* Quick Reference Guide to Postconviction Relief Under Section 809.30, §§ 9.2–.7, *infra*; *see also infra* Form 9.39A.

[20] *Rosado v. State*, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). The 90-day time limit is considered regulatory, not jurisdictional, *Klimas v. State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977), and motions for modification of sentence may therefore be brought whenever a new factor is discovered, *see infra* §§ 9.14, 9.43.

[21] Applicable to offenses occurring on or after December 31, 1999.

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Aug. 2024, No. 824; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-78 (July 30, 2024).

[1] Because this sample fee agreement does not contain the language required by SCR 20:1.15(b)(4m), this flat fee payment must be placed in the firm's trust account until earned.

[1] Because the advanced fee is unearned until the attorney performs a certain number of hours of work, the attorney must deposit the payments in a client trust account. *See* SCR 20:1.15(b)(4).

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the Wisconsin Jury Instructions—Criminal are current through the July 2024 release.

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